12290

(16,323.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 191.

THE SMITHSONIAN INSTITUTION, APPELLANT,

vs.

LEVI W. MEECH AND SUSAN MARIA MEECH, HIS WIFE; STEPHEN T. MEECH, W. W. MEECH AND JAENNETTE MEECH, HIS WIFE; LUCY M. LORD AND JAMES LEANDER LORD, HER HUSBAND.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from supreme court of the District of Columbia	1	1
Caption	1	1
Bill of complaint	1	1
Exhibit No. 1—Will of Robert S. Avery, July 22, 1893	6	6
No. 2—Will of Robert S. Avery, Sept. 13, 1882	8	8
No. 3—Deed from Timothy Sands to Lydia Tyler Avery, April 20, 1885	11	11
No. 4—Memorandum note in handwriting of Mrs. Avery, dated October 26, 1885	13	12
No. 5—Agreement of lease between Robert S. Avery and Lorenzo D. Bumpus, Sept. 20, 1887	13	13
Answer of Julia N. Avery, executrix	14	14
Answer of Levi W. Meech *et al.*	16	16
Amendment to bill	19	18

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	Original.	Print.
Consent as to amendment	19	19
Replication	19	19
Consent as to replication	19	19
Stipulation making new parties defendants	20	19
Evidence for complainant	20	20
Testimony of George C. Hazelton	21	21
Lorenzo D. Bumpus	24	23
Alice L. Bumpus	26	26
John F. Cox	28	27
Ambrose H. Chase	34	33
Harmon M. Brush	36	36
Exhibit A. H. No. 2—Promissory note of Timothy Sands, May 22, 1884	37	37
Testimony of Leland P. Shidy	40	39
Exhibit A. H. No. 3—Memorandum note in handwriting of Mrs. Avery, dated Oct. 26, 1885	44	43
Testimony of Julia C. Bradley	49	48
Exhibit A. H. No. 4—Affidavit of Mrs. Julia C. Bradley, November 18, 1890	51	51
Evidence for defendants	55	54
Exhibit A. H. No. 5—Certified copy of the accounts of Lydia T. Meech and Lydia T. Avery (*née* Meech) with The Norwich Savings Society	56	55
Examiner's certificate	57	56
Decree	58	56
Opinion	59	58
Appeal	67	66
Citation	67	66
Acceptance of service of citation	68	67
Stipulation as to security on appeal	68	67
Memorandum of deposit as security on appeal	68	67
Clerk's certificate	68	67
Minutes of argument	70	68
Opinion	71	68
Decree	75	75
Order allowing appeal	76	75
Stipulation as to value of property	77	76
Order fixing amount of appeal bond	78	76
Appeal bond	79	76
Citation and acceptance of service	80	77
Supersedeas bond	81	78
Clerk's certificate	83	79

1 In the Court of Appeals of the District of Columbia.

LEVI W. MEECH *et al.*, Appellants,
vs.
THE SMITHSONIAN INSTITUTION. } No. 558.

Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION, Plaintiff,
vs.
LEVI W. MEECH, STEPHEN T. MEECH, W. W. Meech, Lucy M. Lord, and Julia N. Avery, Executrix, Defendants. } Equity. No. 16496.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Bill.

Filed June 4, 1895.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION, Plaintiff,
vs.
LEVI W. MEECH, STEPHEN T. MEECH, W. W. Meech, Lucy M. Lord, and Julia N. Avery, Executrix, Defendants. } Equity. No. 16496.

To the honorable court:

The plaintiffs complains as follows:

1. They are an institution established by act of Congress for the increase and diffusion of knowledge among men and authorized by law to receive and hold property, real and personal, by gift, devise, or bequest for the purposes of said trust. They are represented by a secretary, and their business affairs are conducted at Washington, in said District.

2. The defendants Meech are the brothers and the defendant Lord is the sister, and they are all of the heirs-at-law of Lydia Tyler Avery, late of Washington, deceased, who was the wife of
2 Robert Stanton Avery, also late of Washington, deceased. They are sued as said heirs-at-law. The said Lydia died 18 November, 1890, and the said Robert 12 September, 1894, both at Washington. Julia N. Avery, defendant, is sued as she is executrix of the last will and testament of said Robert.

3. Said will was duly admitted to probate by this court, holding

a term for orphans' court business, 2d February, 1895, and the said Julia qualified as executrix and is proceeding to administer upon said estate. A copy of said will is hereby filed, marked Exhibit A No. 1, which plaintiffs pray may be taken as a part of this bill.

4. The said Robert by his said will bequeathes to the sister and brother of his late wife, meaning thereby the defendants Meech and the defendant Lord, one thousand ($1,000) dollars, to be equally divided between them, upon the condition that they acquiesce in the said will; and in the event of their not acquiescing, but disputing his said will, he gives the same to these plaintiffs as residuary legatees.

5. These plaintiffs aver that the defendant Lord and the defendants Meech, the sisters and brothers of the late wife of the said testator, have not acquiesced in his said will, but, on the contrary, have sought and still seek to defeat the same, and that they do dispute his said will in respect to an object cherished by the testator, to wit, the gift of a certain lot and house thereon, known as No. 326 A street southeast, in Washington, which lot and house was the property of the said testator at the date of his death, and which he had given to these plaintiffs and in specific terms included in the residuary bequest. These plaintiffs, by virtue of the terms of said will, and in pursuance of the cherished intention of the said testator, having accepted the devises and bequests of the said will, have entered into possession of said premises as lawful owners thereof; but the said defendants, disputing the will of said testator, and refusing to acquiesce in the disposition made by him of said premises, have by a writing of 23d May, 1895, addressed to the counsel of these plaintiffs, made formal demand for the possession of the same, claiming the fee-simple title thereto as heirs-at-law of said Lydia T. Avery.

The plaintiffs say that the said defendants have violated the condition of said bequest of $1,000 and forfeited all right thereto, and that the several shares of the said defendants, amounting in all to said sum of $1,000, pass by the terms of said will to these plaintiffs as residuary legatees, and that the same is payable to these plaintiffs.

6. The said Robert Stanton Avery lived to be 86 years of age. For many years he was in the employ of the Government in the Coast Survey office. He was frugal and self-denying, lived a quiet and retired life, and devoted himself to scientific research and experiment, chiefly in the matter of phonetic type. His wife was somewhat younger and apparently of more vigorous health than he. They were remote from society and lived plainly. His labor was severe and protracted, and to equip himself he had type made at a considerable expense, did his own printing, and performed work of an abstruse character, yet of scientific value.

3

They had no children. In pursuance of a plan, the motives and purposes of which Mr. Avery fully shared, the said Robert Stanton Avery, on the 13th September, 1882, executed a will, a copy of which is hereto appended, which plaintiffs pray may be taken as a part of their bill and marked Exhibit No. 2.

Said will reads in part: "I give unto my beloved wife Lydia T. Avery, if she outlives me, in trust while she lives, all my real estate and personal property, with such exceptions as I may make hereafter in this will or in codicils annexed thereto, to hold and to use for her support as long as she lives, and to keep in good condition for its final disposition,—and I hereby direct her to pay the expenses of my funeral, which I desire may not be an expensive one."

It then proceeds: "Having always had a love for the sciences, and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded to give all my real and personal property, with such exceptions as I may make hereafter in this will, or in codocils annexed thereto, to the Board of Regents of the Smithsonian Institution to provide for its safe keeping, and to use the income from it in extending the sciences by publishing with the phonetic printer's types I have invented and use, or other phonetic types found to be better, lectures, memoirs and treatises relating to them and containing new matter and especially such as treat of those parts of science depending on the mechanical laws of what is supposed to be an ethereal medium—such as automic chemistry, electrical and magnetic phenomena, and those of light and heat, all tending to the development of an ethereal philosophy. * * *

* * * This fund may be called the "Avery fund" or the "fund contributed by Robert T. Avery and his wife Lydia T. Avery for the extension of the sciences." * * *

By the testator's last will he gives certain small legacies, and then bequeathes all the residue of his estate, real and personal, to the Smithsonian Institution, a body corporate by virtue of the laws of the United States, of which institution Samuel P. Langley is now secretary, having its legal residence in the District of Columbia, unto it and its successors forever, meaning these plaintiffs, and the plaintiffs have accepted said bequest and are prepared to gratify, so far as may be the wishes of the testator in making said gift, for the benefit of science.

7. The lot and house known as 326 A street is more fully described in the deed of purchase of the same as part of lot 2, in square 787; also a part of lot lettered I, in said square, being a small strip for convenience of access to alley in the rear of said house, said lot described in the deed being identical with that mentioned in the will.

The said Robert Stanton Avery, in April, 1885, not being in firm health and believing that his wife would survive him, bought of Timothy Sands the premises in question, they being next east of the house where Mr. and Mrs. Avery lived as their home.

4 Mr. Avery conducted the business of said purchase, and himself paid out of his own money the sum of $2,900, and assumed the liability of paying a balance of the consideration money, namely, $600, to the holder of a note of that amount secured by mortgage on the premises. This note of $600 Mr. Avery paid out of his own money in October, 1885. When the deed was to be made out by Mr. Sands, Mr. Avery directed that the name of his wife,

Lydia Tyler Avery, be inserted as grantee instead of his own. This was accordinly done. (A copy of said deed is herewith filed as Exhibit No. 3, and plaintiffs pray that the same be taken as a part of this bill.) Mrs. Avery accompanied her husband to the office of Mr. Sands' attorney, where Mr. Avery handed over the money and took the deed. The deed was delivered to Mr. Avery (not to his wife). Mr. Avery took the same to the registry of deeds, where it was recorded 21 April, 1885, in Liber 1118, fol. 278, and the record shows that the original deed was delivered to Mr. Avery 15 May, 1885.

The plaintiffs are informed and believe, and therefore aver, that Mr. Avery always treated this property as dedicated to his wife only in the event that she outlived him, and in that event for her life only. The plaintiffs are likewise informed and believe, and therefore aver, that Mrs. Avery so regarded her rights and privileges in said property. She believed that she had an interest in it so that she would enjoy the rents and profits of the same if she outlived her husband, which was thought likely, as she was in better health than he and younger, but that if she died first it was to go to him in order that with all his property at his death it would be given to the Smithsonian Institution, to carry out the plan which both Mr. and Mrs. Avery had in mind for the benefit of education and science.

As indicating such qualified ownership, plaintiffs say that a thorough search of the house in which Mr. and Mrs. Avery lived and died has brought to light only one paper that bears upon this transaction beyond the deeds and mortgage note, viz., a memorandum note, in handwriting of Mrs. Avery, dated October 26, 1885, a copy of which plaintiffs herewith file, marked Exhibit No. 4, and pray to be taken as a part of their bill. Said note uses language denoting not the single ownership of the writer but a joint interest. It does not say *me*, b t *us*, which word is used four successive times. The said Robert Stanton Avery collected the rents as his own and leased the same in his own name, as appears from the original of an indenture of agreement dated 20 September, 1887, between Robert S. Avery and Lorenzo D. Bumpus, which plaintiffs file herewith, marked Exhibit No. 5, and pray may be taken as a part of this bill. The said Bumpus entered under said lease and paid rent as a tenant of said Avery. Such payments were made to Mr. Avery and receipts given by him in his name as of his own property in the presence of Mrs. Avery, and with her full knowledge and consent.

The plaintiffs aver the fact to be that at the time of the purchase of this property by Mr. Avery it was expressly agreed by and between himself and his wife that said premises were to be deeded to her, not to give her the fee-simple title to the same, nor even to give her a life interest absolutely therein, but solely for the purpose of providing for her in the event of her husband dying before she should die, as that appeared almost certain would happen, and that Mrs. Avery was to make her will, giving the same to her husband, so that the general purpose of his will should apply to this after-acquired real estate.

The plaintiffs further say that Mrs. Avery repeatedly stated to her friends that the premises in question had been bought by Mr. Avery out of his earnings and savings; that title had been permitted to be taken in her name upon the express understanding and mutual agreement that, in the event of her death preceding that of her husband, he was to enjoy the same for his life, and then it was to go as a part of his estate to the Smithsonian Institution for the promotion of science, and that she expressed to an attorney-at-law her intention to have him prepare a will embodying such a disposition of the property, but her last illness resulted suddenly in her death, preventing her carrying such intention into effect.

Immediately upon the death of Mrs. Avery her husband took steps to place beyond controversy the facts of this conveyance. Besides executing a codicil to his will stating that the property was really his, though standing in the name of his wife, he made affidavit of the facts and procured the affidavits of six other persons, who knew from Mrs. Avery's conversation that she regarded the transaction to be—which affidavits these plaintiffs are ready to produce, but do not file as exhibits—all of them tending to prove that Mrs. Avery considered the provision to be for her in case she outlived her husband, and the property itself, in any event, after the death of her husband and herself to go to the Smithsonian Institution.

The plaintiffs have filed in the office of the register of deeds for this District to be recorded a declaration of ownership by them of said premises, together with the affidavit of the said Robert Stanton Avery in regard to said title, said papers having been filed of record May 15th, 1895.

Wherefore these plaintiffs say that the equitable title to said premises remained in said Robert Stanton Avery and passed to these plaintiffs by his last will; that the defendants, who claim as heirs-at-law of Mrs. Avery, knew substantially these facts, they having been stated to their counsel, and, notwithstanding their said knowledge, they have demanded possession of said premises, as hereinbefore alleged.

The plaintiffs, therefore, pray as follows:

1.

That this court by its order declare that the equitable title to the premises known as No. 326 A street southeast, being part of lot 2, in square 787, in the city of Washington, and part of lot lettered I, as described in deed of Timothy Sands to Lydia Tyler Avery,
6 recorded in Lib. 1118, fol. 278, of the land records of the District of Columbia, remain in Robert Stanton Avery, and is now by virtue of his will vested in the Smithsonian Institution.

2.

That the defendants Meech and Lord and each of them be perpetually enjoined from claiming title to said premises as heirs-at-law of the said Lydia Tyler Avery.

3.

That Julia N. Avery, executrix, defendant, be directed to treat the one thousand dollars given to the sister and the brothers of the testator as forfeited for breach of condition annexed to said legacy and as having fallen into the residium.

4.

That plaintiffs have such other or further relief in the premises as the nature of the case may require.

To which end the plaintiffs pray for process against the defendants Levi W. Meech, Stephen T. Meech, W. W. Meech, and Lucy M. Lord and the defendant, Julia N. Avery, executrix.

The defendants are Levi W. Meech, Stephen T. Meech, W. W. Meech, Lucy M. Lord, and Julia N. Avery.

S. P. LANGLEY,
Secretary of the Smithsonian Institution.

FRANK W. HACKETT,
Solicitor for Pl'ffs.

PLAINTIFFS' EXHIBITS Nos. 1, 2, 3, 4, & 5.

Filed June 4, 1895.

EXHIBIT No. 1.

I, Robert Stanton Avery, 2nd, of the city of Washington, in the District of Columbia, being conscious of the uncertainties of life and having full use of the faculties of a sound mind, do make and publish this instrument in writing as and for my last will and testament, hereby expressly revoking and annulling all and every such testamentary paper and codicil or codicils thereto by me heretofore executed.

I hereby nominate and appoint my niece Julia N. Avery executrix of my last will and testament requesting that she be required to give no security or bond as such.

In addition to her commissions as executrix I bequeath to her, in recognition of her care of me, two thousand (2,000) dollars to be paid so soon after my death as conveniently may be, and also during her life the coupons maturing upon the two thou-
sand dollars which I now have invested in five *per cent.*
7 gold-bearing bonds of the Northern Pacific Railroad Com-
pany; should such bonds be paid during her life the principal shall be reinvested and the interest derived therefrom shall be paid to her during life. Upon her death the principal shall fall into the residuary fund hereinafter created.

I bequeath the sum of four hundred (400) dollars to be equally divided among the children of my brother Ulysses, living at the time of my death.

I bequeath the sum of four hundred (400) dollars to be equally divided among the children of my brother Isaac other than my niece Julia for whom I have already provided.

I bequeath to my sister Sarah and to my brothers John and Erasmus four hundred (400) dollars each, in all twelve hundred dollars.

I bequeath to the sister and brothers of my late wife one thousand dollars (1,000) to be equally divided between them. I have already given these last over a thousand dollars which my wife inherited from her father, also clothing and other gifts, thus equalizing substantially my gifts to her family and to mine. These bequests are all made upon the condition that the legatees acquiesce in this will and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named.

All the rest and residue of my estate, of whatsoever nature, real, personal, or mixed and wheresoever situate, I hereby give, devise and bequeath unto the Smithsonian Institution, a body corporate by virtue of the laws of the United States, of which institution Samuel P. Langley is now secretary, having its legal residence in the District of Columbia, unto it and its successors forever.

Having always had a love for the sciences and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded that the residuary gift above made to the Smithsonian Institution will best express my interest in science. As my labors have been directed to the invention and use of phonetic type, I desire, but do not require, that the income derived by the Smithsonian Institution from this gift may be applied, so far as it may determine, to promoting publications in such type of scientific publication, especially of such publications as may relate to phonetic type and printing. I also desire, but by no means require that such part of said income as the said institution shall determine shall be applied to the publication of lectures and treatises upon and concerning those mechanical laws governing an etherial medium which are treated of in atomic chemistry and which are supposed to govern phenomena of electricity, magnetism, light and heat. Prizes might be given for essays on these subjects and upon such other kindred subjects as may meet the approval of the institution. I would like however to have published first the multiplying table and also IV-plate, logar-thms, publication of the table of squares, cubes, square roots, cube roots, reciprocals, prime numbers, and factors, some of which I have written out. If the institution shall approve, the fund derived from the residuary bequest shall be called "the Avery fund" or "the
8 fund contributed by Robert S. Avery and his wife Lydia T. Avery, for the extension of the sciences," and all publications made from the fund shall bear this inscription.

The property known as part of lot 2 (two) in square 787 in the city of Washington, D. C., being premises No. 326 A St. S. E., is my property although the title stands in my wife's name. I include it in the residuary bequest to the Smithsonian Institution.

In testimony of all whereof I have hereunto set my hand and seal this 22nd day of July 1893.

(Signed) ROBERT S. AVERY. [SEAL.]

Signed, sealed, published, and declared by the above-named tes-

tator as and for his last will and testament in our presence, who, in his presence and in the presence of each other and at his request *and at his request*, have hereunto signed our names as witnesses hereof.

(Signed) LEON L. FRIEDRICH.
(Signed) LELAND P. SHIDY.
(Signed) JOS. M. JOHANNES.

EXHIBIT No. 2.

Copy.

I, Robert Stanton Avery 2d, of the city of Washington in the District of Columbia, being conscious of the uncertainties of life and having the full use of the faculties of a sound mind, do make and publish this my last will and only will and testament, in the following form and manner.—I give unto my beloved wife Lydia T. Avery, if she outlives me, in trust while she lives, all my real estate and personal property, with such exceptions as I may make hereafter in this will or in codicils annexed thereto, to hold and to use for her support as long as she lives, and to keep in good condition for its final disposition; and I hereby direct her to pay the expenses of my funeral, which I desire may not be an expensive one.—

Having always had a love for the sciences, and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded to give all my real and personal property, with such exceptions as I may make hereafter in this will or in codicils annexed thereto, to the Board of Regents of the Smithsonian Institution to provide for its safe keeping and to use the income from it in extending the sciences by publishing, with the phonetic printer's types I have invented and use-, or other phonetic types found to be better, lectures, memoirs, or treatises relating to them and containing new matter, and especially such as treat of those parts of science depending on the mechanical laws of what is supposed to be an ethereal medium, such as atomic chemistry, electrical and magnetic phenomena, and those of light and heat, all tending to the development of an ethereal philosophy.

Prizes may be given for such essays on these and kindred
9 subjects as may by the rules of publication of the institution be found worthy of diffusion.—

But the multiplying table, and also the IV-place logarithms, written by me and now electrotyped must first be published; and then the V-place logarithms I have nearly finished in manuscript must be completed and electrotyped with my new figure types and published; and then the tables of squares, cubes, square roots, cube roots, reciprocals, prime numbers and factors, some of which I have written out, must be finished in like manner electrotyped and published.

This fund may be called "the Avery fund" or "the fund contributed by Robert S. Avery and his wife Lydia T. Avery for the extension of the sciences," and all publications made with this fund

must have a note thereon stating that they have been thus published.

After the death of my wife, the Board of Regents of the Smithsonian Institution will be expected to select an executor of this will and provide for making the fund as useful as possible, limiting its use as much as they can to the objects specified.

In witness whereof, I have hereunto set my hand and seal, this thirteenth day of September anno Domini one thousand eight hundred and eighty-two.

ROBERT STANTON AVERY. [SEAL.]

The above-written instrument was subscribed by the said Robert Stanton Avery in our presence, and he at the same time published and declared *to* above instrument so subscribed to be his last will and testament, and we, at the testator's request and in his presence, have signed our names as witnesses hereto.

JAS. A. TAIT.
MORGAN F. MOUNT.
LELAND P. SHIDY.

In view of the fact that my wife departed this life on the 18th day of November, A. D. 1890, without a will and without issue and for other reasons, I add this, my first codicil to my last will and testament, dated the thirtieth (30th) day of September, A. D. 1882, and hereto attached:

The property known as part of lot two (2) in square 787 or premises No. 326 A street, southeast, was purchased and paid for by me on the twentieth (20th) day of April, A. D 1885, subsequent to the above date and was taken in the name of my wife Lydia T. Avery, by my permission and upon the express understanding and condition, that she, the said Lydia T. Avery would make a will in my favor, as will more fully appear by reference being had to seven (7) certain affidavits filed with the recorder of deeds of the District of Columbia in any suit that may be instituted by those named as the trustees of my estate. Therefore, in order to carry out more fully my wishes, as expressed in the aforesaid will which I herewith republish and declare in every particular, except as herein modified, I give, devise and bequeath to the Regents of the Smithsonian Institute and to two members of the National Academy of Science, to be, by said Regents selected and their successors forever, all my real estate, personal and mixed, wherever situate or being and whether owned by me at the date of this codicil or subsequently acquired, with full power to sell or encumber the same by mortgage or deed of trust, without requiring the purchaser or purchasers to see to the application of the purchase-money, in trust for the purposes and objects particularly set forth and enumerated in the will by me executed and hereto attached.

In testimony of which I have hereunto set my hand this 20th day of December, A. D. 1892.

ROBERT STANTON AVERY.

Signed, published, and declared by Robert Stanton Avery as and for the first codicil to his last will and testament, dated the 30th of September, A. D. 1882, in the presence of us, who, at his request and in his presence and in the presence of one another, have subscribed our names as witnesses thereto.

JAS. A. TAIT,
LELAND P. SHIDY,
JOHN F. COX,
All of Washington, D. C.

I have concluded to add this, my second codicil to my last and only will and testament, dated the thirteenth day of September, A. D. 1882, and hereto attached:

I give to my niece Julia N. Avery, who lives with me, two thousand dollars to be paid in money when my estate is settled; and while she lives, the coupons from the two thousand dollars I have of the five per cent. gold-bearing bonds of the Northern Pacific railroad. I give to my sister and brothers nephews and nieces two thousand dollars to be distributed as follows, to the children of Ulysses four hundred, to the children of Isaac four hundred, to Sister Sarah and Brothers John and Erasmus four hundred each. I give to the sister and brothers of my late wife one thousand dollars, to be divided equally between them. I have already given them over a thousand which my wife had inherited from her father, also clothing and other things. So my present codicil will make the gifts to her family and to mine nearly equal. These gifts are made on the condition that no attempt be made to break this will, and that if such an attempt be made, those who engage in it are to lose their claims to the gifts here made to the-. I desire that all proper efforts be made to introduce the phonetic books and types I have been preparing, and I believe the executors of this will and its codicils will see the importance of doing this and act accordingly.

In testimony of which I have hereunto set my hand this 19 day of May, A. D. 1893.

ROBERT STANTON AVERY.

Signed, published, and declared by Robert Stanton Avery as and for the second codicil to his last will and testament, dated
11 the 13th of September, A. D. 1882, in the presence of us, who, at his request and in his presence and in the presence of one another, have subscribed our names as witnesses thereto.

LEON L. FRIEDRICH, M. D.
LELAND P. SHIDY.
JOSEPH M. JOHANNES.

These three witnesses personally appeared before me and acknowledged their signatures to this codicil.

JAS. A. TAIT,
Notary Public.

Exhibit No. 3.

This indenture, made this 20th day of April, in the year of our Lord one thousand eight hundred and eighty-five, between Timothy Sands of Washington, D. C. party of the 1st part and Lydia Tyler Avery of the same place party of 2d part.

Witnesseth, That the said Timothy Sands for and in co-sideration of the sum of thirty-five hundred dollars, current money of the United States, to him in hand paid by the said party of the second part, the receipt of which before the ensealing and delivery of these presents, is hereby acknowledged, has granted, bargained, and sold, aliened, conveyed and confirmed, and by these presents does grant, bargain, and sell, alien, enfeoff, convey, and confirm, unto and to the use of the said Lydia Tyler Avery her heirs and assigns, all the certain piece or parcel of land and premises situate and being in the city of Washington, District of Columbia, and known and distinguished as all the certain piece or parcel of land upon the official plat of said city as part of lot No. two (2) in square No. seven hundred and eighty-seven (787) and more fully described by metes and bounds as follows—commencing eleven (11) feet nine and one-half (9½) inches from the southwest corner of said lot No. two (2) in square No. seven eighty-seven (787) and running thence east forty-two feet two & ½ inches (2 & ½) to the dividing line between lots one (1) and two (2) of said square—thence at right angles on said dividing line north eighty (80) feet—thence at right angles west twenty (20) feet—thence at right angles north thirty (30) feet—thence at right angles west twenty-two (22) feet and two & a half (2 & ½) inches—thence at right angles south one hundred and ten (110) feet to the place of beginning—being the same premises conveyed to Harmon M. Brush by Thos. H. G. Todd and Francis A. Todd his wife recorded — Liber 920—fol. 184 &c. Also the following-described real estate known as part of lot lettered I in said square described by metes and bounds as follows—commencing at the southwest corner of lot lettered I in said square. Thence running east along the south line of said lot four (4) feet—thence north at right angles three (3) feet—thence at right angles west four (4) feet—thence at right angles south three (3) feet to the place of beginning—being a part of Emil Friedrich's subdivision of lot fifteen (15) and north 33 feet 1 inch of lot 16, into lot F, being the same premises conveyed to Harmon M. Brush by Rudolph Friedrich surviving trustee &c. by deed recorded in Liber 1067 fol. 218 &c., together with the rights, easements, privileges and appurtenances to the same belonging or in anywise thereto appertaining.

12

To have and to hold the said land and premises, with the appurtenances and hereditaments to the same belonging, unto and to the only use and benefit of said Lydia Tyler Avery her heirs and assigns.

And the said Timothy Sands party of the first part his heirs, executors and administrators does hereby covenant with said party of

the second part her heirs and assigns, that the said hereinabove-described land and premises, with the appurtenances, unto said party of the second part her heirs and assigns, from and against all persons claiming by, through or under said party of the first part or his heirs and assigns except as — $600 and interest to be paid June 1st 1886 on trust deed, the said party of the first part and his heirs shall and will forever warrant and defend by these presents; and further, that any act or deed deemed by counsel, learned in law, requisite and necessary the more perfectly to assure unto said party of the second part her heirs and assigns, the said land and premises hereinabove granted, the said party of the first part and his heirs shall and will at all times, at the cost of the person requesting the same, do, perform, execute, and deliver.

In testimony whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

TIMOTHY SANDS. [SEAL.]

Signed, sealed, and delivered in presence of—
JAMES B. WIMER.
GEO. C. HAZELTON.

DISTRICT OF COLUMAIA, *County of Washington*, } *To wit:*

I, James B. Wimer, a notary public in and for the county and District aforesaid, do hereby certify that Timothy Sands, of Washington, D. C, party to a certain deed bearing date on the 20th day of April, A. D. 1885, and hereto annexed, personally appeared before me, in the District aforesaid, the said Timothy Sands being personally well known to me to be the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and notarial seal this 20th day of April, A. D. 1885.

[NOTARIAL SEAL.] J. B. WIMER,
Notary Public.

Endorsement: Received for record on the 21, 9 a. m., day of April, A. D. 1885, and recorded in Liber No. 1118, folio 278 *et seq.*

13 EXHIBIT No. 4.

WASHINGTON, *Oct.* 26, 1885.

The rent was paid the 17 of A(pril) to T. Sands; the deed received the 20 of April; the tax bill of $13.91 was paid May 1st and May 28. We loaned $12.50, with the promise that Mr. T. Sands would bring this money himself, but, failing to do so, will *will* Mr. Hazelton please make it right to us.

Amount due for rent	$23 36
Tax	13 91
Loaned	12 50
	49 77

Please send the papers; they are invaluable to us.

MRS. L. T. AVERY.

Mrs. Avery wishes you would oblige us just now if you can arrange with the bearer, Mr. R. S. Avery; perhaps some time may be of service to you. The money and papers are valuable to us just now.

L. T. AVERY.

EXHIBIT No. 5.

Agreement between Landlord and Tenant.

Memorandum of an agreement, between Robert S. Avery and Lorenzo D. Bumpus, all of the city of Washington, District of Columbia, whereby the said Robert S. Avery has agreed to let, and does hereby let, to the said Lorenzo D. Bumpus house No. 326 on A St. S. E. between Third and Fourth in said city, by the month commencing on the first day of Oct. A. D. 1887, at and for the monthly rent of twenty-five dollars, payable in full in advance, that is to say, on said first day of each and every month during which the said tenancy may continue, as rent in advance for the next ensuing month.

And the said Lorenzo B. Bumpus has agreed to take, and does hereby take and hold the said premises as a tenant by the month at the said rent, payable as aforesaid, and that he will pay the water rent and gas bills as they become due, and that he will not sublet or assign the said premises, or carry on any business therein, except that of dwelling without the written consent of the said lessor, or use the same for any disorderly or unlawful purpose.

Provided always, that if the said lessee shall fail to pay the said rent in full in advance as aforesaid, although there should have been no legal or formal demand for any rent whatever, or shall neglect to pay the water rent or gas bills at the time and on the day
14 when the same shall fall due and be payable as hereinbefore mentioned, or shall sublet or assign the said premises, or carry on any business therein except that of dwelling without the written consent as aforesaid, or shall use the same for any disorderly or unlawful purpose, or break either of the aforesaid covenants, then, and in either of said events, this lease, and all things herein contained, shall cease and determine, and shall operate as a notice to quit, the thirty days' notice to quit being hereby expressly waived. And the said lessor, his heirs and assigns, shall and may proceed to recover the possession of said premises, under and by virtue of a seven days' summons under the provisions of sections 684 and 685 of the Revised Statutes of the United States, relating to the District of Columbia, to regulate proceedings in cases between landlords and tenants; or by such legal process as may at the time be in operation in like case; but if no default occurs on the part of the said lessee to the aforesaid provisions referred to above, then he shall be entitled to not less than thirty days' notice to vacate the house and premises, and the owner or agent shall be entitled to the

same notice from the lessee, should he desire to vacate the aforesaid house and premises.

And it is further provided, that if under the provisions of this agreement a seven days' summons shall be served, and a compromise or settlement shall be made thereupon it shall not constitute a waiver of any covenant herein contained, or of the agreement itself. And the said lessee hereby agrees to deliver the house in the same order in which it was received, usual wear and tear, fire and storm excepted; and it is hereby provided and agreed that no waiver of one breach of any covenant herein shall be construed to be a waiver of the covenant itself, or of any subsequent breach thereof.

In testimony whereof we have hereunto set our hands this twentieth day of September, A. D. 1887.

ROBERT S. AVERY.
LORENZO D. BUMPUS.

Witness-:
WM. J. HARRIS.
JOHN R. HOGAN.

Answer of Julia N. Avery.

Filed June 10, 1895.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION, Plaintiff,
vs.
LEVI W. MEECH, STEPHEN T. MEECH, W. W. Meech, Lucy M. Lord, and Julia N. Avery, Executrix, Defendants. } Equity. No. 16496.

The answer of Julia N. Avery, executrix, one of the defendants, to the bill of complaint of The Smithsonian Institution, plaintiffs.

To the honorable court:

This defendant, reserving unto herself all rights of exception to the said bill of complaint, for answer thereto saith:

15 1. This defendant is advised and believes that the statement of facts as alleged in paragraph 1 of said bill is true.

2. This defendant admits all the statements of facts as set forth in paragraph 2 of plaintiff's bill.

3. This defendant admits that the last will and testament of the said Robert S. Avery, deceased, was admitted to probate as alleged in paragraph 3 of said bill, and that she qualified as executrix as therein alleged.

4. This defendant admits that the bequests in the will of the said Robert S. Avery are as alleged in paragraph 4 of said bill, and she is advised and believes that the effect of the refusal of the legatees is as alleged in said paragraph, but for greater certainty craves to refer to the last will of said testator when the same shall be produced.

5. This defendant admits that the legatees mentioned in para-

graph 5 of said bill do dispute the last will of said testator so far as the same relates to the said house and lot of which she had notice from said legatees by letter of their attorney bearing date May 10th, 1895, and she is advised and believes that the effect of the contention of said legatees is as is alleged in paragraph 5 of said bill, but for greater certainty refers to the last will of said testator when the same shall be produced, and as to the other matters in said paragraph she has no knowledge save what is set forth therein.

6. This defendant says that she is informed and believes that the allegations contained in paragraph 6 of said bill are true saving and excepting so far as the same relate to the wife of the testator sharing in the "motives and purposes" of a plan of the testator fully set forth in a paper-writing in part quoted in said paragraph, of which the defendant has no knowledge beyond what is contained in said paragraph, and also saving and excepting the allegation that the wife of the testator was in more "vigorous health" than her husband, of which she has no knowledge beyond what is stated in said paragraph, and this defendant is advised that the plaintiffs have accepted the bequests under the will of said testator and are prepared to carry out his wishes as the same is alleged in said paragraph.

7. This defendant, disclaiming all knowledge of the motives, purposes, and beliefs of the testator and his said wife as stated in paragraph 7 of said bill and the deductions as therein alleged, is informed and believes the allegations of fact to be true as in said paragraph set forth, saving and excepting the statements that there was an express agreement by and between the testator and his wife in relation to the purchase of the house and lot in controversy, the terms of which were as alleged in said paragraph, and that the wife made certain declarations respecting the terms and conditions upon which the deed of said house and lot was executed in her name, and that she instructed her attorney to prepare her will embodying the disposition of the said house and lot as contained in said paragraph, and that her sudden death defeated such purpose on her part; all of which this defendant has no knowledge beyond what is contained in said paragraph.

16 And this defendant denies all and all manner of unlawful combination and confederacy wherewith she is by the said bill charged; without this, that there is any other matter, cause, or thing in the said complainants' said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is not true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

JULIA N. AVERY, *Executrix.*

CHASE & MAISH,
Solicitors for Julia N. Avery, Executrix.

DISTRICT OF COLUMBIA, *City of Washington*, } *ss:*

Before me, the subscriber, a notary public in and for the city and county aforesaid, personally appeared Julia N. Avery, above named, who, being by me duly sworn according to law, deposes and says that she read the above and foregoing answer by her subscribed, and that she knows the contents thereof, and that the facts therein stated upon her personal knowledge are true and those stated upon information and belief she believes to be true.

Sworn and subscribed to before me this 8th day of June, A. D. 1895.

[SEAL.] O. M. BALL,
Notary Public.

Answer of the Defendants.

Filed July 15, 1895.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION, Plaintiff,
vs.
LEVI W. MEECH *et al.*, Defendants. } In Equity. No. —.

The joint and several answers of the defendants Levi W. Meech, Stephen T. Meech, William W. Meech, and Lucy M. Lord to the bill of complaint of the above-named plaintiff.

1, 2, & 3. They admit these paragraphs of said bill of complaint.

4. They admit that a legacy of one thousand dollars was bequeathed by the said Robert Stanton Avery to these defendants, but they say they have refused to receive the same upon the condition that they shall acquiesce in the devise by the said Avery of the property described in the seventh paragraph of said bill of complaint, and that the executrix has not paid the said legacy to
17 these defendants and refuses to pay the same except upon said condition. They further deny the validity of the condition attached to said legacy and say that they are entitled to receive the same discharged of any and all conditions whatsoever.

5. Answering so much of the 5th paragraph of the bill as is not already answered by the matters set forth in the preceding paragraph of this answer, they admit that the plaintiff is in possession of said part of lot 2, in square 787, described in the 7th paragraph of the bill, but they say said possession is wrongful and in violation of the rights of these defendants, who are the only heirs-at-law of Lydia T. Avery, who died seized and possessed in fee-simple of said real estate, and that these defendants, being such heirs-at-law, are alone entitled to the possession of said property as the lawful and rightful owners thereof, and they admit that they have made formal demand of the plaintiff for the possession thereof, as set forth in said paragraph.

6. Answering the 6th paragraph of the bill, they admit the exe-

cution of a will dated the 13th of September, 1882, by the said Robert S. Avery, but for greater certainty as to the contents thereof they prefer to refer to the paper itself when the same shall be produced. They, however, deny the relevancy or materiality thereof to the title of these defendants to said part of lot 2, in square 787, or that said testator had any interest, legal or equitable, in said real estate or possessed any power to devise the same to the complainant or any one else. They further deny the relevancy or materiality, as affecting the title of defendants to said property, of the matters and things set forth in said 6th paragraph concerning the life, habits, and desires of said testator and the correctness of the deductions and conclusions drawn therefrom by the plaintiff, and they claim the same benefit from this denial as if they had specially demurred thereto.

7. On information and belief they deny that the purchase-money for the real estate aforesaid was the money of said Robert S. Avery, but, even if the same were his, they say his payment of the same to the vendor, Timothy Sands, and his direction to said Sands to convey the said real estate in fee-simple to said Lydia T. Avery was in law and in equity an irrevocable gift and settlement of said real estate upon said Lydia by her said husband according to the purport and terms of said deed of conveyance. These defendants, however, upon information and belief aver that the title to said property was taken in the name of said Lydia, because at the time the said husband was justly indebted to her for monies used by him during their marriage and belonging to her, and that said conveyance was intended to be expressive of his obligation to her in that respect, so that practically and in legal effect the said purchase-money was really the money of said Lydia, owned by her at the time of her marriage or acquired by her subsequently in other modes than from her husband. They have no personal knowledge of the fact, as alleged in the bill, that at or about the time of said purchase there was an understanding or agreement, verbal or otherwise, between the said Lydia and her said husband
18 that the said real estate was to be held by said Lydia in any other way than upon the terms expressed in the said deed of conveyance to her, and, if said alleged fact be true and relevant, they demand strict proof thereof; and they further deny the relevancy or materiality of the allegations of the bill as to the declaration, intentions, or desires of her said husband in regard to said property. These defendants have no knowledge or information in respect of said declarations, intentions, or desires, and therefore can neither admit or deny the same, but if the same be relevant or material they demand strict proof thereof.

They admit that the plaintiff, on the 15th day of May, 1895, caused to be recorded among the land records of this District a declaration of ownership of said property, but they deny that said declaration can in any way affect the title of these defendants to said real estate except to place a cloud thereon, and they pray now, by way of cross-bill, that in any final decree which may be rendered in

this cause that said declaration may be adjudicated as null and voi
so far as it purports to affect said title.

And, having fully answered, they pray to be hence dismissed, t
gether with their respective costs.

LEVI W. MEECH.
STEPHEN T. MEECH.
WILLIAM W. MEECH.
LUCY M. LORD.

We do solemnly swear that we have read the foregoing answ
by us subscribed and know the contents thereof, and that the fac
therein stated upon our personal knowledge we know to be tru
and those stated upon information and belief we believe to be tru

LEVI W. MEECH.
STEPHEN T. MEECH.
WILLIAM W. MEECH.
LUCY M. LORD.

Sworn and subscribed before me by Levi W. Meech this 15th da
of June, 1895.

[SEAL.] C. LESLIE HOPKINS,
Notary Public for New London County, State of Connecticut.

Sworn and subscribed to before me by Stephen T. Meech thi
fifth day of July, 1895.

CHAS. B. CHAPMAN,
[SEAL.] *Notary Public for New London County,*
State of Connecticut.

Sworn and subscribed to before me by William W. Meech this 2
day of June, 1895.

[SEAL.] AUGUSTA J. WASHBURN,
Notary Public for State of New Jersey,
Co. Columbus, Borough of Vineland.

19 Sworn and subscribed to before me by Lucy M. Lord th
27 day of June, 1895.

OLIVER WALKER,
[SEAL.] *Notary Public for County of Hampshire, ss.*

Amendment to Bill.

Filed October 9, 1895.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTE, Plaintiff,
vs.
LEVI W. MEECH, STEPHEN T. MEECH, W. W. MEECH, and LUCY W. LORD, Defendants. } Equity. No. 1649

The plaintiffs amend their bill by adding to paragraph two
their prayers the following:

And that the defendants Levi W. Meech, Stephen T. Meech, W

W. Meech, and Lucy W. Lord, their heirs and assigns, be required to execute a deed of the said premises to the plaintiffs, and that any wife or husband having an interest be made party hereto and required to join in said deed.

FRANK W. HACKETT,
Sol. for Plaintiffs.

We consent to the above amendment.

FRANKLIN H. MACKEY,
Sol. for Def'ts.

CHASE & MAISH,
Att'ys for Julia N. Avery.

Replication.

Filed October 9, 1895.

Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION
vs.
LEVI W. MEECH *et al.*
} Eq. No. 16496.

The plaintiffs hereby join issue with the defendants.

By their att'y, FRANK W. HACKETT.

This replication may be filed *nunc pro tunc or* of within ten days after the filing of our respective answers.

FRANKLIN H. MACKEY,
For Def'ts Meech & Lord.

CHASE & MAISH,
For Def't Julia N. Avery.

20 *Appearance by F. H. Mackey for and Answer of Jeanette Meech, James Leander Lord, Susan Maria Meech, Made Additional Defendants by Stipulation.*

Filed October 14, 1895.

Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION
vs.
LEVI W. MEECH *et al.*
} Eq. No. 16496.

It is hereby agreed that the following persons be made parties defendant, and that the answer of Meech and Lord be taken as their respective answers, viz: *Jaennette Meech*, wife of Wm. W. Meech; *James Leander Lord*, husband of Lucy Maria Lord, and *Susan Maria Meech*, wife of Levi W. Meech; Stephen Tyler Meech being unmarried.

FRANKLIN H. MACKEY,
Solicitor for said Additional Parties.
FRANK W. HACKETT, *For Pl'ff.*
CHASE & MAISH,
Solicitors for Julia N. Avery.

Testimony for Complainant.

Filed October 25, 1895.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION
vs.
LEVI W. MEECH *et al.*
} In Equity. No. 16496.

Be it remembered that at an examination of witnesses begun and held on the 17th day of June, 1895, pursuant to agreement, and on the 18th day of June, 1895, agreeably to adjournment, personally appeared before me the within-named Lorenzo D. Bumpus, Alice L. Bumpus, Harmon M. Brush, Julia C. Bradley, John F. Cox, Ambrose H. Chase, George C. Hazelton, Leland P. Shidy, who, being produced as witnesses of lawful age for and on behalf of the complainant and being first duly sworn and cautioned to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in the above-entitled cause, did depose and say as follows:

MONDAY, *June* 17, 1895—2 o'clock p. m.

Met pursuant to agreement.

Present: Frank W. Hackett, Esq., solicitor for the complainant; Messrs. Chase & Maish, solicitors for the defendant Julia N. Avery, executrix; Franklin H. Mackey, Esq., solicitor for the other defendants; also the examiner, and—

21 GEORGE C. HAZELTON, who, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. Please state your name, occupation, and residence.

A. George C. Hazelton; I am a practising lawyer, and I reside in Washington city, D. C.

Q. Please look at this deed, purporting to be from Timothy Sands to Lydia Tyler Avery, to the execution of which you appear to be one of the witnesses, and state what you know about the execution of it.

A. Well, as to the mere execution of the deed, the deed was filled up by me; it is in my handwriting, except the printing. I saw Mr. Timothy Sands, the grantor named in the deed, execute it, and I witnessed it, as appears by my signature here.

Mr. MACKEY: We do not dispute the execution of the deed.

Q. Will you state what you recall as to the circumstances of that business transaction between Mr. Sands and Mr. Avery, the husband of the grantee, so far as you recollect?

Mr. MACKEY: I object to the question unless it is made more specific.

Mr. HACKETT: What took place at the time of the delivery of this deed and immediately preceding? I want the *res gestæ* as to the sale of this property.

Mr. MACKEY: I want to enter an objection to the question on the ground that it is irrelevant and immaterial. The deed speaks for itself.

A. Mr. Sands a little before and at the time this deed was made was a client of mine, at that time living in this city; he was a widower; he owned the property described in the deed and he wanted to sell it. The grantee with her husband occupied it at that time as rentors under Mr. Sands, and he, being rather decrepid and old, asked me to go up with him and see Mr. Avery and his wife. He got a carriage and I rode up with him to the Coast Survey building and saw Mr. Avery, and he went with us to the house and they looked it over and talked about the terms of the sale and purchase. They agreed practically upon the sum and arranged to meet at my office, in the Lenman building, on New York avenue, to consummate the transaction. They came there and I drew up the deed at the request of Mr. Sands and at the request of Avery. I will not say not his wife, for she may have expressed herself at the time as to something about it, but at their request I drew the deed up to her. The price and everything, of course, were agreed upon. Then a day or two after that they came back with the money, and Mr. Avery delivered the money
22 on my table and it was counted there and they took the deed and went away and Mr. Sands took the money. Mr. Wimer, I think, was in the building then, and we had him come into my office, as they were old people, and he brought his notarial seal and took the acknowledgment of Mr. Sands to the deed.

Q. What part, if any, did Mrs. Avery take in this business transaction?

Mr. MACKEY: Objected to as immaterial and irrelevant to the issues in this cause.

A. Well, there was no dispute between them as to what was to be done. It was directed that the deed be made to her, and there seemed to be an understanding between them that that was to be the way the deed should go.

Q. I do not refer to any arrangement between them at the time. I only inquire as to the part Mrs. Avery took in this business transaction.

A. She was present when we called at the house and she came to my office twice with him as husband and wife.

Q. Was anything said by her?

A. It has been a long time ago. I could not tell what was said, but he paid the money over, and there seemed to be an understanding between them that it was all right, and that is all I could tell.

Q. Please look at this paper-writing, purporting to be signed by Mrs. Avery, in which she speaks of "us" with reference to some unfinished business. Does that recall anything to your mind; and if so, what?

A. Well, my recollection is very indistinct in regard to this.

Mr. HACKETT: The paper which I show you is the original of Exhibit No. 4 to the bill of complaint in this cause.

Mr. MACKEY: Objected to on the ground that there is no connection whatever shown between the paper and the property in question. It is a paper written after the date of the deed and it is not identified in any way as having been written by Mrs. Avery.

Mr. HACKETT: I will meet that objection by proof hereafter.

Mr. MACKEY: And I make further objection that if said paper has any relation to this property the circumstances under which it is written are not shown.

WITNESS: This paper explains itself; it is in three items, rent, taxes, and money loaned. I think when the deed passed there was some little unfinished, left over. They did not have the papers with them that day to explain the matter fully, and this was a "drib" left over; for instance, here is an item of rent which related to the house they occupied, and then they probably paid some taxes for Mr. Sands and also loaned him some money. Before the sale of this house Mr. Sands was very hard up and was in a lawsuit with his son-in-law, and I take it that this paper relates to these little matters which were not closed up when the deed passed——

23 Mr. MACKEY (interposing): I desire to interrupt the witness long enough to enter an objection to this testimony on the ground that the witness is only undertaking to state his beliefs and opinion and speculations in regard to the paper, and does not so far undertake to testify upon his personal knowledge in regard to it; and I desire, if permitted, to request the witness to confine himself to his personal knowledge in regard to the paper.

Mr. HACKETT: You are permitted with great pleasure, Mr. Mackey, to make that request of the witness.

WITNESS: As I stated in the first place, my recollection as to the paper is indistinct. I would not swear positively as to it; I cannot swear positively as to it, because my recollection is not clear enough, but I am satisfied——

Q. (Interposing.) I do not ask what the paper means. I wish to know whether it possibly recalls to your mind any fact with reference to the doing of anything in connection with the property after the deed was delivered.

A. I will not say that I do not remember anything about it, because I have an indistinct recollection that there was some unfinished matter, and that I spoke to Mr. Sands about it.

Q. Who was it that saw you about it—Mrs. Avery?

A. She sent it by Mr. Avery, I suppose.

Q. I want the fact.

A. It would be impossible for me to swear that Mr. Avery came with that paper.

Q. Did you ever, as counsel for Mr. Sands, have any business transaction with Mr. Avery?

A. I have stated the facts just as they were. I saw them both together when we went to see about the house, and they both came to my office together in the making of the deed and the payment of the money.

Q. I wish to find out, without leading you, with whom the business was transacted—whether with Mrs. Avery or with both of them?

A. They were both present. Mr. Avery did most of the talking, and he handed me the money.

Cross-examination.

By Mr. MACKEY:

Q. I think you stated in your testimony-in-chief that they took the deed and went away. Who did you mean by "they"?

A. I mean that the deed was given to Mr. Avery. When I say "they" I mean that they seemed to be both agreed about the matter; they seemed to work together; they were acting in harmony.

Q. The deed was given to whom?

A. To him—Mr. Avery.

Q. And they went away together?

A. Yes, sir.

Q. You are not able to say who delivered to you this paper, of which Exhibit No 4. to the bill is a copy?

24 A. No. I will not swear that the paper even came into my hands.

GEO. C. HAZELTON.

Subscribed and sworn to before me this 17th day of June, 1895.

ALBERT HARPER, *Examiner.*

Mr. HACKETT: I here give in evidence this original deed, from Timothy Sands to Lydia Tyler Avery, dated April 20, 1885, and recorded April 21, 1885, in Liber No. 1118, at folio 278 *et seq.*, of the land records of the District of Columbia.

NOTE.—It is agreed that said deed is sufficiently proven, and the same is herewith filed in evidence and marked Exhibit A. H. No. 1.

ALBERT HARPER, *Examiner.*

See page No. 19.

LORENZO D. BUMPUS, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. State your name, age, occupation, and residence.

A. Lorenzo D. Bumpus; fifty-one years of age. I am at present

a watchman, and I reside at No. 131 California street northeast, in this city.

Q. You served in the Union army, I believe, during the war?

A. Yes, sir; as colonel of the 57th Pennsylvania.

Q. How long have you lived in this city?

A. Nine years last February.

Q. State whether or not you were a tenant of Robert S. Avery of house No. 326 A street southeast, in this city.

A. I was for five years or more.

Q. Will you examine the original lease, which is Exhibit No. 5 to the bill of complaint in this case and purporting to be signed Lorenzo D. Bumpus, and state whether that is a counterpart of the lease executed between you two gentlemen?

A. Yes, sir; and that is my signature.

Mr. HACKETT: I here give in evidence said lease as Exhibit No. 5 to the bill of complaint.

Mr. MACKEY: I waive production of the attesting witness, but I object to the paper as irrelevant, immaterial, and incompetent, it being a transaction *res inter alios*, Mrs. Avery herself not being a party to it and — being in no way brought to her knowledge.

Q. Please state what you did under this lease.

A. Lieut. D. P. Bradley took me and introduced me to Mr. and Mrs. Avery, and we came to terms as to the rental of the house. It was in very bad condition, and they allowed me five
25 dollars a month for the first year for putting the house in condition. I went to work and painted the house from cellar to garret.

Q. You say they allowed you, etc. Do I understand that you hired the house from Mr. and Mrs. Avery?

A. They were together. Mrs. Avery, perhaps, did the bulk of the talking, but Mr. Avery did the business; that is the way it was done, so far as that is concerned. She would say, "You keep still, Mr. Avery; I want to talk." That is the usual way it was when she was present.

Q. How long did you occupy the house?

A. I think five years.

Q. I have here a large number of receipts which you sent to me for the payment of the rent of this house over this entire period and purporting to be written and signed by Robert S. Avery. Take one of them haphazard, one dated December, 1887, as a sample, and tell me what was the fact with regard to your taking the receipts for rent, who wrote them and gave them to you.

A. They are written by and signed by Robert S. Avery.

Q. To whom did you pay the rent?

A. To Robert S. Avery.

Q. Was Mrs. Avery ever present?

A. Always; I do not know that I ever paid the rent when she was not present.

Q. Have you here all the receipts you can find?

A. Well, I did not look for receipts; I was looking for a copy of that lease when I found those receipts.

Q. You do recollect that no receipt was given except by Mr. Avery?

A. No receipt was given except by Mr. Avery.

Mr. HACKETT: I have thirty-nine of these receipts here, one of which, dated in December, 1887, I here give in evidence as follows:

WASHINGTON, D. C., 26 *Dec.*, 1887.

Received of Col. L. D. Bumpus rent for house No. 326 A St. southeast for the month of January, 1888.

ROBERT S. AVERY.

Mr. MACKEY: To the admission of which I object on the ground of its irrelevancy and being long after the date of the deed (Exhibit A. H. No. 1) and because it shows a transaction between other parties than Mrs. Avery.

Q. Was anything said in Mrs. Avery's presence, except what was said with regard to paying the rent, indicating who the owner of the property was?

Mr. MACKEY: Objected to. The witness should state what was said and not give his opinion with regard to the effect of what was said. The witness is asked whether anything was said indicating who the owner of the property w s. I should prefer that he state what was said and not what was indicated.

26 A. Mrs. Avery told me in my house and in her house and in his presence repeatedly that the property was bought with Mr. Avery's money; that she had to do the business for Mr. Avery, as he was not really competent to do it for himself; that she did the business for Mr. Avery and took the deed in her name.

Q. Did you have any conversation with Mrs. Avery with reference to where this property should go after her death?

A. Repeatedly.

Q. State what was said.

Mr. MACKEY: I object to any statement made by Mrs. Avery in regard to this property after the execution of the deed on the ground that an attempt to show title to property by the mere verbal statements of a party would be in contravention of the statute of frauds.

A. She told me repeatedly that Mr. Avery and she proposed to leave whatever they had at their death to the Smithsonian Institute to establish an "Avery fund" in the interest of science, and that whichever one died first the other one was to carry out the wishes of the two, that everything they had was to be left to the Smithsonian Institute.

Mr. MACKEY: Cross-examination waived.

LORENZO D. BUMPUS.

Subscribed and sworn to before me this 17th day of June, 1895.

ALBERT HARPER, *Examiner.*

ALICE L. BUMPUS, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. You are the wife of the last witness?
A. Yes, sir.
Q. How long have you been married?
A. Eighteen years.
Q. State whether you lived in a house on Capitol Hill rented of Robert S. Avery in 1887.
A. Yes, sir.
Q. How near was that to where Mr. and Mrs. Avery themselves lived?
A. The adjoining lot.
Q. How intimately were you acquainted with them during that period?
A. Well, I guess about as intimate as one could get; they very often spoke to us.
Q. Describe Mr. and Mrs. Avery as you would in telling anybody about them.
A. I am afraid that is the hardest thing in the world to do,
27 because they were so peculiar and eccentric. Mr. Avery was not so peculiar. Mr. Avery I do not think had any bad habits; he attended to his books at home, and she seemed to attend to his business outside as much as she could.
Q. Which was the older of the two?
A. Mr. Avery, considerably, I think.
Q. Were you present at any time when your husband paid the rent?
A. Yes, sir.
Q. Who transacted the business—received the rent and gave the receipts?
A. Mr. Avery always took the money and handed the receipts.
Q. How intimate were you with Mrs. Avery with regard to her putting confidence in you and telling you of her affairs?
A. She would just come over and tell me—well, in fact, she would start off and tell about her property over on B street, and that she owned that and owned this place, and that it was Mr. Avery who bought both places, and that after a little she was going to tear down and build a new house; she would tell what she was going to do, and that he was not able to do so and so because his health would not permit.
Q. I understand she said that she owned the property on B street?
A. Yes, sir; she said so, but I do not think she had anything to do with it in her life.
Q. Did she ever say anything to you about how the money was obtained with which that property was bought where you lived?

A. Well, she used to say that it was Mr. Avery's money; that he had earned the money. and she claimed the property he hadbought.

Q. How did she say he had earned it?

A. Well, I guess in the Coast Survey. I believe that was where he worked the greater part of the time.

Q. I meant with reference to the size or amount of the money.

A. I could not say how he got the money.

Q. You say she said that she claimed the property. What was her language?

A. She said that Mr. Avery had bought the property and told her she could have it, and she always said to me that it was her property.

Q. The property where you lived?

A. Yes, sir; and she said the property on B street was hers, too, but I guessed not.

Q. Did she say anything about what was to become of that property after they died?

Mr. MACKEY: I object to this question for the same reasons given to a similar question propounded to the previous witness.

A. Well, she said over to our house once that when they were through with it they wished it to go to the Smithsonian Institute.

Mr. MACKEY: Cross-examination waived.

ALICE L. BUMPUS.

28 Subscribed and sworn to before me this 17th day of June, 1895.

ALBERT HARPER, *Examiner.*

JOHN F. COX, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. State your name, occupation, and residence.

A. John F. Cox; attorney-at-law, and I reside at No. 3319 O street northwest, in Washington, D. C.

Q. Did you know the late Robert S. Avery, and in what way did you happen to know him?

A. I had occasion to visit Mr. Avery in the latter part of 1889. At the request of Mr. Allen C. Clark, of this city, I called upon Mr. Avery to see him about the sale of some lots in square 986, and after making two or three visits we came to an agreement and I purchased the lots for Mr. Clark.

Q. Did you know Mrs. Avery?

A. Yes; I was introduced to Mrs. Avery. I became acquainted with her through the visits I made to Mr. Avery.

Q. Where did you see her?

A. At her house. I always saw her in company with Mr. Avery, at No. 320 A street southeast, in this city.

Q. Will you describe as well as you can the age and appearance and general conduct of those two persons?

Mr. MACKEY: Objected to as irrelevant.

A. Well, I was struck with their appearance; they were very odd looking in appearance. Mr. Avery was a gentleman with full beard and long hair and looked to be a literary man, and from my conversation with them I found that they had both lived a very retired life, and that they were very fond of literary matters. In my early acquaintance with him he spoke of his property and his intention to leave it all to the Smithsonian Institute.

Mr. MACKEY: I object to so much of the answer as undertakes to state what Mr. Avery said.

Q. Was Mrs. Avery present at the time?

A. She was present at the time, and he gave me rather a full history of the pieces of property that he had acquired through the money he had received in serving the Government in the Coast Survey. He said there was one piece of property—the one next door, which is in question in this suit, I believe—that he had permitted Mrs. Avery to take in her own name, and Mrs. Avery said she had taken it in her name; that it was their intention at their death to let the survivor enjoy the property which Mr. Avery had and she had during his or her life and at his or her death it was to go to the Smithsonian Institute. She seemed to be impressed with the
29 idea that she was going to outlive him, and she informed me that he had made a will and requested me to look at the will with a view of making a new one. I do not recall to mind now the particular objection that she had to the old one, but it may have been in the number of witnesses I saw attached to the old will. I do not know whether that was the case or not. However, he said it would be more satisfactory to him to have a new will made, and it was her intention also to make a will, but she was under the belief that she was to outlive him, and she had me attend to his will first. In his presence she entered into the conversation of making a will and requested that his will be made first. Some months, probably, elapsed between that time and my bringing to him the will or copy of the will which I supposed he would sign, and he was struck with the copy that I had prepared, and at that time, not feeling very well—well enough to go out—he asked me if that could not answer for the will and he go to the justice's office in the neighborhood and execute that paper as his will. I told him there was no objection to it——

Mr. MACKEY (interposing): I object to any statement of conversations with Mr. Avery, and notify counsel that I will move the court to strike it out on the ground of irrelevancy.

WITNESS: We afterwards repaired to the justice's office and he waited there while I went to the Coast Survey office and asked the other witness, Mr. Shidy, to come around, which he did, and the will was executed. The will that was executed was typewritten

and only intended to be a copy to be submitted to him to see if it was satisfactory to him.

Q. Go on and state any other conversation, particularly with reference to Mrs. Avery; any statement she made about this property or the disposition of it.

A. Mrs. Avery always intended to have me make her will.

Q. Did she give you any directions about it?

A. The same language of his will was to be embodied in hers. She regarded this property that she held only in trust, as it were. She always spoke about it as property which had been bought with the money that he had saved, and she always gave him great amount of praise for the economy which he had exercised in the early history of his life. I had frequent talks with them both. I asked Mr. Avery if he thought that at any time after his death his will would be contested. I even went so far as to say that it could be arranged in a different manner than by will if he saw fit to do so. He informed me that he did not fear any action from any member of his own family, and that in view of the fact that Mrs. Avery had given one thousand dollars to her mother out of the assets of the Norwich savings bank, I think, was the name of it, he did not suppose any action would be taken upon their part. This was said in Mrs. Avery's presence.

Mr. MACKEY: I object to so much of the answer as under-
30 takes to testify to what Mrs. Avery regarded about this property, and also to any conversation had with Mr. Avery and the statements made by him with regard to this property or with regard to any will that he proposed to make or any statements by Mrs. Avery in regard to any will she proposed to make or to be made, and I notify counsel that I will move the court to strike it out.

Q. What did you do with reference to preparing some affidavits after the death of Mrs. Avery in respect to the ownership of this property in question?

Mr. MACKEY: Objected to as incompetent, irrelevant, and immaterial.

A. Mr. Avery told me that there were some friends of Mrs. Avery who were acquainted with the disposition that she intended to make of the property by will—that is, they knew of her intention to make a will and to provide that the property should follow the same course as the property he had embodied in his own will, and he gave me the names of these people and asked me to go and converse with them and from such conversations to draw up affidavits which would cover the point, which I did.

Q. How many did you prepare?

A. I think there were five.

Q. You handed them over to the Smithsonian Institute after my application?

A. Yes.

Mr. MACKEY: Now, again, I object to the answer on the same ground as stated in my previous objection to other conversations had with Mr. Avery after the death of Mrs. Avery, and also because these affidavits are not produced and contents not known.

Q. Will you examine what purports to be an affidavit of Mr. Avery himself and state in whose handwriting it is and what you know about it?

A. It is my handwriting.

Mr. HACKETT: Please read that affidavit, so that it may be incorporated in evidence here upon the record.

Mr. MACKEY: I object to the reading of the affidavit or any portion of it upon the record as being irrelevant and incompetent.

WITNESS: This affidavit reads as follows:

"Robert Stanton Avery, residing at No. 320 A street southeast, in the city of Washington, District of Columbia, being duly sworn according to law, deposes and says that on the twentieth day of April, A. D. 1885, he purchased from Timothy Sands, of said city and District, part of lot two (2) in square numbered seven hundred and eighty-seven (787), situated in said city, and more particularly described in deed recorded in Liber No. 1118, at folio 278 *et seq.*, one of the land records of the District of Columbia, being premises No. 326 A street southeast; that at the time of said purchase he was not in good health, and his wife, Lydia Tyler Avery, being of the
31 opinion that she would outlive him he permitted said property to be transferred to her upon the then expressed condition that she was to make a will in his favor in the event of his surviving her, as he had already done in her favor in the event of her surviving him, the mutual understanding being that the combined property was to be left to the survivor during life and then to be disposed of by will for scientific or educational purposes, as had been talked over and agreed upon by them in conversations between them, this disposition of all their estate being so made in consequence of their married life not having been blessed with children. Affiant further states that the entire consideration money paid over for said property was saved exclusively from his earnings; that his wife, Lydia Tyler Avery, departed this life on the eighteenth (18) day of November, A. D. 1890, without issue and without a will, although he, at her request, during her last illness had prepared one embodying her wishes as herein expressed, but at the time of presenting it to her for execution she was too far gone to execute the same, and never thereafter rallied sufficiently to perform any such act.

ROBERT STANTON AVERY.

Subscribed and sworn to before me this fifteenth day of November, A. D. 1892.

ROBERT V. HUGHES,

[SEAL.] *Notary Public.*"

Q. Do you recollect the names of any other witnesses whose affidavits you took?

A. Mrs. Lieut. Bradley and Col. Bumpus and his wife and Mrs. Nute.

Q. What was the object of Mr. Avery in having these affidavits taken, if he stated?

A. Mr. Avery at first talked of having me get quitclaims from the heirs of Mrs. Avery for the purpose of having them on record, and in the absence of that he suggested that these affidavits be made.

(NOTE.—It is understood that Mr. Mackey, for the parties whom he represents in this case, objects to all testimony which undertakes to give evidence of statements made by Mr. Avery or conversations had by him with any persons not parties to this suit, and that this objection need not be repeated.)

Q. What were you to do with these affidavits?

A. They were to be handed over to the officers of the Smithsonian Institute.

Q. Was anything said by you with reference to putting them on record?

A. Yes; they were to be recorded at first, but afterwards it was ascertained that they could not be recorded.

Q. How soon was this after Mrs. Avery's death that these affidavits were obtained?

32 A. She had not been dead long. It was not very long after her death.

Q. Now, Mr. Cox, you may have testified on this point; if so, it escaped my notice. I want to know particularly whether Mrs. Avery ever requested you to prepare a will for her or ever talked with you with reference to sending for you for that purpose.

Mr. MACKEY: Objected to as incompetent and irrelevant.

A. Mrs. Avery, during the times that I called and talked about the property, made known to me the fact that she wished to make her will some time after my first visit, and she at that time gave me a history of how she obtained this property and the disposition that was to be made of it. She said that her husband had permitted her to take the property in her own name, and that she wished to make a will which would follow out his intentions as to his own property, and the reason I did not make her will was because frequently I would suggest it to her, and she would say, "Well, after you make Mr. Avery's will and he executes his, why then I can make mine; but he is going to die, I know, before I will. He is so sick." I do not mean to say she would make this statement in his presence. She would follow me to the door and go out as far as the gate with me, and urge upon me to attend to Mr. Avery's will, and then do the same thing for her.

Q. State whether this purpose of hers to give this property to the Smithsonian Institute had any reference to an agreement when the property was put in her name.

Mr. MACKEY: Objected to as calling for an opinion of law and for the opinion of the witness.

A. That question I would not be able to answer. Let me see my affidavit.

Mr. HACKETT (handing to witness his affidavit): Here it is.

Mr. MACKEY: I want to object to witness reading his affidavit and testifying afterwards from a result of that reading. I wish to know from the witness whether he has not recollection sufficient to enable him to answer that question without reading his affidavit.

WITNESS: I think I have.

Mr. MACKEY: Then I submit that the witness should answer the question without reading the affidavit.

Q. (Repeated.) State whether this purpose of hers to give this property to the Smithsonian Institute had any reference to an agreement when the property was put in her name.

A. From her statements I concluded that it was mutually understood that the property should follow that direction.

Mr. MACKEY: I object to the witness stating his conclusion.

Q. You say mutually. You mean when?

A. I do not recall that she ever stated to me that there was an arrangement or an agreement conditional in her taking the
33 property, but I understood that she took the property knowing that it was to go in the same direction with the other property, even if Mr. Avery had changed his will for some other literary purposes or for the benefit of the arts and sciences.

Mr. HACKETT: Now, I think you can read that affidavit of yours if you wish to refresh your mind, and I wish to state here that I have had no opportunity to confer with the witness before putting him on the stand.

Mr. MACKEY: I submit that the affidavit cannot be read unless I have an opportunity to read it to cross-examine him in regard to it.

Q. After reading that affidavit is your memory refreshed as to these circumstances about which you have been testifying to any extent? If so, what?

A. I find that my testimony agrees with my affidavit, and that there is nothing new in the affidavit which I could further testify to to enlighten the subject.

Cross-examination.

By Mr. MACKEY:

Q. At the time that you had these conversations with Mrs. Avery and at the time that she made these statements to you, what business or professional relation did you have with her—that is to say, I want to know whether you were her professional adviser in regard to drawing her will and in regard to the property?

A. I was her attorney, acting for her in that matter.

Mr. MACKEY: It now appearing that these statements were made by Mrs. Avery to Mr. Cox by reason of his professional relation to her, I object to the competency of the testimony in this regard and notify counsel that I will move the court to disregard it and exclude it from the record.

By Mr. HACKETT:

Q. I understand you to say that these statements of Mrs. Avery were made in the presence of Mr. Avery when they two were together.

A. Yes, sir.

By Mr. MACKEY:

Q. You were also counsel, I believe, for Mr. Avery?

A. I was called in to perform this matter of business for them both.

Q. In your professional capacity as attorney?

A. Yes, sir.

Q. Are you able to state, Mr. Cox, of your own knowledge that you know any condition upon which the title to this property was placed in the name of Mrs. Avery, any precedent condition?

A. Only except as she disclosed by her statement to me.

34 NOTE.—The witness having stated, after examining the exhibit to the bill of complaint which purports to be a copy of the codicil of Mr. Avery executed the 20th of December, 1892, that he did sign it as a witness, it is agreed between counsel that upon the production of the original and the proof of it by another witness Mr. Cox need not be recalled as to this point.

WITNESS: My recollection is that I wrote the original of the codicil.

JOHN F. COX.

Subscribed and sworn to before me this 17th day of June, 1895.

ALBERT HARPER, *Examiner.*

AMBROSE H. CHASE, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. Please state your name, occupation, and residence.

A. Ambrose H. Chase; I am a newspaper man and an attorney-at-law, and I reside at No. 2830 14th street, northwest, in this city.

Q. Have you acted as attorney for the executrix of Mr. Avery in this matter?

A. I have.

Q. In that capacity have you had occasion to be frequently at the house where the late Robert S. Avery lived and died?

A. I have.

Q. Whether or not you made search through the house for any papers of Mr. and Mrs. Avery with reference particularly to the disputed ownership of this property?

A. I made careful examination of all the papers and read every paper I could find.

Q. Did you hunt for any check book or bank books?

A. I did.

Q. Did you find any?

A. I did not.

Q. Have you made any inquiry at the various banks of Washington to ascertain whether Mr. Avery had a bank account?

A. I have at several.

Q. What was the result?

A. I did not succeed in finding that he kept any bank account; I mean prior to 1885. I did find an old bank account at the National Capital bank, but it was since 1885.

Q. I hand you this paper, which is the original of Exhibit No. 4 to the bill of complaint, and ask you to state whether you found that.

A. Yes; I found this among the papers.

Q. And whether that was the only paper having relation to this matter you found.

35 A. Yes; that is the only paper.

Q. Do you know in whose handwriting it is?

A. I do not.

Q. I also submit to you a paper purporting to be written by Robert S. Avery and headed "Expenses of my wife's burial," and dated December, 1890, and ask you whether that is a paper you found.

A. Yes; that is a paper I found.

Q. Did you know Levi W. Meech, one of the defendants?

A. I did not.

Q. Have you ever known him?

A. I have never known him.

Q. You have had no conversation, then, with any of the defendants about this case?

A. None. I never saw any of them, to my knowledge.

Cross-examination.

By Mr. MACKEY:

Q. How long after Mr. Avery's death was it that you visited the house to make an examination of these papers?

A. It was done recently—about a month ago, I should think. I do not remember, but two or three weeks ago.

Q. In whose custody did you find the papers?

A. In the custody of the executrix, his niece.

Q. Do you know how long they had been in her custody?

A. I do not know. I know that she had general charge of the things there and lived in the house.

Q. You think she had charge of them because she lived in the house.

A. Yes.

Q. Do you know who had charge of them before she had?

A. Her uncle, Mr. Avery.

Q. Do you know that?

A. No; I do not know personally.

Q. In what condition did you find these papers?

A. There was a large number of papers up there and I examined them all carefully. I do not remember just whether that paper was in an envelope or whether it was done up in a bundle. Some were done up in a bundle with rubber bands, some with strings, and some were loose.

Q. As matter of fact, then, of your own knowledge, you do not know in whose custody these papers have been since the death of Mrs. Avery?

A. No; I do not know.

Q. The first you ever saw of them was about a month or so ago?

A. Yes.

36 Redirect.

By Mr. HACKETT:

Q. Was Miss Avery living in her uncle's house at the time of his death?

A. She was.

Q. And she has been living there ever since?

A. Yes.

Q. Anybody else living there?

A. No.

Recross.

By Mr. MACKEY:

Q. Do you know that of your own knowledge?

A. Yes. Some of these papers were in a trunk and some in a desk downstairs, and Miss Avery had the keys, and she produced the keys there and I was able to search for them in that way. Nobody else had access to them.

Q. Was this search made by you since the filing of this bill or before?

A. I think before. I was looking for some securities of the Northern Pacific Railroad Company which we could not account for, and the finding of these papers was an incidental thing.

Q. What banks did you visit to ascertain whether Mr. Avery had a bank account?

A. The National Bank of the Republic, Lewis Johnson & Co.'s bank, the Second National bank, and the Bank of Washington.

Q. You did not visit any more?

A. No.

A. H. CHASE.

Subscribed and sworn to before me this 17th day of June, 1895.

ALBERT HARPER, *Examiner.*

HARMON M. BRUSH, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. You are a clerk in the Indian Office, are you not?

A. Yes.

Q. Were you formerly owner of property on Capitol Hill that was sold to Timothy Sands and by him sold to Robert S. Avery?

A. Yes; I sold to Sands.

Q. Do you recollect the circumstance that $600 was left due of the mortgage on that property at the time that Mr. Avery bought it?

A. Yes.

Q. Will you please examine this note and, after examin-
37 ing it, say whether, to the best of your recollection, that note was paid, when, and who paid it?

A. I cannot tell just how it was paid; there is my mark on there paid, but I cannot tell you exactly. I know I called on Mr. Avery once at the house in relation to it and then he called on me or met me at the Second National bank, but whether he paid me at the Second National bank or on the evening that I called at the house I cannot tell.

Q. In what form was the money paid?

A. In bills. That is all I know about it—that is, I know that he paid me.

Q. Did you have any dealings with Mrs. Avery about it?

A. No; none at all. I think she was present the evening I called at the house, but she was not a fit person, according to my idea, to do any business with; she was not responsible, and whatever there was of it was done with Mr. Avery. As far as I can recollect, I will not say positively, I think I called there, whether at his instance or not I cannot tell, but my recollection is that he met me at the Second National bank, where I do my business, and he paid me the money on the note and I marked it cancelled; possibly he might have paid me the night I was there at the house, but I think not. I think he met me at the Second National bank at a specified time. I never did any business with her. I do not think she was at all responsible for anything at that time.

Mr. HACKETT: I here give the note in evidence.

(NOTE.—And the same is herewith filed in evidence and marked Exhibit A. H. No. 2.)

EXHIBIT A. H. No. 2.

Filed October 25, 1895.

$600.00. WASHINGTON, D. C., *May 22nd*, 1884.

Secured by deed of trust.

On January 1st, 1886, [after date]* I promise to pay to the order of Harmon M. Brush the sum of six hundred ($600.00) $\frac{00}{100}$ dollars at the bank of Riggs and Co., Washington, D. C., value received, with interest at 6% per annum until paid, interest payable annually.

No. —. Due —. TIMOTHY SANDS.

J. D. CROISSARTT,
Witness to Signature of Timothy Sands.

(Written across the face in red ink:) Paid.

Endorsements: Received May 26, 1885, thirty-six dollars ($36), one year's interest on within. May 26, '85. Pay to the order of Lydia Tyler Avery. Harmon M. Brush. June 11, 1885.
38 June 11, 1885, I paid Harmon M. Brush $2.75, his expenses for obtaining the release from the trustees, and $1.25 as recorder of the same.

Cross-examination.

By Mr. MACKEY:

Q. Do you know anything of the source from which Mr. Avery got the money to pay this note?

A. No. All I know is that he paid the money.

Q. I notice on this note the endorsement, "Pay to the order of Lydia Tyler Avery. Harmon M. Brush. June 11, 1885." Is that your signature?

A. Yes; and that is my writing, but I do not remember anything about that.

Q. You do not remember at whose instance or request you did that?

A. No; I did not know it was there. That is my writing also at the top.

Q. Was that endorsement which I have read put on there at the time of the payment?

A. I cannot say about that. No; I do not think so. I do not remember about it being put there, but it is my signature and writing.

Q. The date, June 11, 1885, is in your handwriting, I believe?

A. Yes; I do not remember a thing about that, and I have no recollection as to when the note was paid.

[* Erased in copy.]

Redirect.

By Mr. HACKETT:

Q. Have you any means of knowing the particular time when you got this money?

A. No.

Q. You do not remember whether it was in October, 1885, or not?

A. I do not know. I have no recollection of it.

Q. The note was due the first of January, 1886?

A. I know the note was paid before it was due.

Q. You cannot tell how long before?

A. No.

Q. Do you keep a bank account?

A. Yes.

Q. Could you turn to it and find out when this note was paid?

A. Well, it is possible that I could.

Q. It was with reference to that endorsement—whether it was in June, 1885, that it was paid or later?

A. I cannot tell without going back and looking up my old books. I do not know whether I have them now or not. That is quite a long while.

39 Q. Are both endorsements in your handwriting—the one at the top and the other?

A. Yes; I think so; yes; that is evidently my handwriting—May 26, 1885.

Q. As I understand, all you can remember now is that when it was paid it was paid by Mr. Avery?

A. Yes; I think it was paid by him.

Recross.

By Mr. MACKEY:

Q. What do you mean by Mrs. Avery not being fit to do business with?

A. I lived near her for some time, and I certainly did then consider her a person off her balance and not capable of doing business. I always looked upon her as such a person, and I never had occasion to do business with her.

Q. Did you consider her as not being mentally balanced?

A. Yes; I always looked upon her as being half crazy.

Q. You thought she was mentally unbalanced and all that?

A. I did, and I was in a position to know.

Q. Did you have any conversation with her?

A. Lots of times. She would get you in a corner and talk you to death if you did not start to run—random talk.

Q. So as to make you believe she was off her mental balance?

A. Yes. I am no physician, but I should consider such a person not responsible for half she said or did, and I looked upon her that way. That is just my general opinion. I never would undertake to do any business with her, because I did not think she was capa-

ble of doing it, and that is why I know I had nothing to do with her in this matter.

Q. Then when you endorsed this note to her——

A. (Interposing.) I do not remember that.

Q. From your opinion of her mental capacity would you have endorsed that note to her at her request or that of her husband?

A. It was done at her husband's request, I have no doubt.

Q. All your business was done with him?

A. Yes.

Q. And therefore, if the endorsement was made, you say it was at his request?

A. Yes; although I have no recollection about that endorsement; I do not remember doing it, but that is my handwriting. That is all I know about it. I cannot recollect it at all; at whose instance I did it, whether at the instance of Mr. Avery or at her instance, I do not remember.

Q. You do not remember her asking you to make that endorsement?

A. I do not.

Mr. HACKETT: I here give notice that I shall move the court to strike from the record so much of the testimony of this wit-
40 ness as refers to his opinion of Mrs. Avery's competency to transact business.

HARMON M. BRUSH.

Subscribed and sworn to before me this 17th day of June, 1895.

ALBERT HARPER, *Examiner.*

Adjourned to—

TUESDAY *June* 18, 1895—3.30 o'clock p. m.

Met pursuant to adjournment.

Present: Frank W. Hackett, Esq., solicitor for the complainant; Messrs. Chase & Maish, solicitors for the defendant Julia N. Avery, executrix; Franklin H. Mackey, Esq., solicitor for the other defendants; also the examiner, and—

LELAND P. SHIDY, who, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. State your name, occupation, age, and residence.

A. Leland P. Shidy; 44 years of age; computer in the Coast Survey office, and I reside at No. 1617 Marion street northwest, in this city.

Q. How long have you been in the Coast Survey office?

A. I have been in the same service there since May, 1873.

Q. What is your present position there?

A. I am acting chief of the Tidal division. It is the position which Mr. Avery held. He was actually chief, but I am not; I am

acting chief at present, but my position on the pay-roll is that of computer.

Q. Were you in the employ of the Coast Survey at the time that Mr. Robert S. Avery was there?

A. O, yes; for a number of years.

Q. How intimate did you know him?

A. About as intimate as one man could know another. I was associated with him every day in my work for a dozen years and saw him very frequently at his home and frequently took meals at his house upon his invitation, and oftentimes spent a week and sometimes as much as three or four weeks at a time in his house. Usually, however, at such times he would be away himself, and I would stay there to keep his wife company, so that she would not be lonely while he was gone.

Q. Give us some idea of the character of the work which Mr. Avery was engaged at in the Coast Survey office.

A. It was work which required considerable knowledge of mathematics and a methodical and careful person to discharge it properly, because if a man did not have knowledge of mathematics and was not methodical he would soon get badly mixed up, the number of stations he having to deal with being so great as to be unable to find anything at all.

41 Q. What was Mr. Avery's success in that office?

A. He was, I think, very successful. He did more than any of his predecessors and got the work into better shape, so that it could be handled with greater ease than it had been at any preceding time. He not only carried on the work of his predecessors, but improved the work in many important details. He devised a number of different ways of predicting the tides—that is, what what would be the tides at future times—for the benefit of mariners. He devised important ways of discussing observations in order to get at the best results. He also classified the results of those which had been made from the time the Coast Survey service began until he was in charge and consolidated the results himself from that knowledge into a single register including, perhaps, a thousand stations where tides had been observed.

Q. State how well you knew Mrs. Avery.

A. I met Mrs. Avery first in about June, 1873, and from that time until her death I saw her very frequently and was in their house sometimes for a week at the time and sometimes a month at a stretch; of course, out of office hours. She would furnish me with room and board and I would be with her and engage in conversation in the evenings and at table times, so that I had frequent opportunities of seeing the woman and knowing her very well.

Q. Do you recollect the circumstance of the purchase by Mr. Avery of the property No. 326 A street southeast, in this city?

A. Yes; I do. I was at their house at the time when they began talking about making the purchase, and they discussed it, in the first place, as to the advisability of getting the property at all, and after that was decided they discussed as to how the deed had better be made out, and Mrs. Avery thought it would be best to put the

deed in her name, although her husband's money was paying for it exclusively, and he thought best to do so and had the deed made out in her name.

Q. Did Mrs. Avery state any reason why the deed should be made out in her name?

A. Yes. She wanted it in her name, in the first place, because she wanted to have the control of that property, as it was immediately contiguous to her own home, and then she thought she would be pretty certain to outlive her husband, and that it would be better in case of his death to have the title in her name than in his name.

Q. State what final disposition, if any, was agreed upon by these two persons in your presence.

Mr. MACKEY: I object to any statement by witness as to what the agreement was between them because it was merged in the deed.

A. It was agreed that she should have the property during her lifetime, and that she should make a will transferring it at her death to the Smithsonian Institute.

Q. I understand that this conversation which you are now testifying to took place at or about the time of the actual purchase and the making of the deed. Was any reference made to the
42 ownership of this property that you can now recollect subsequent to the date when it was bought?

A. After that they referred to it in a number of interviews while I was present, and every time they alluded to it with the same understanding—that is, that the property was to be hers during her lifetime and was to be disposed of at her death, in accordance with the will of Mr. Avery, with the rest of his property.

Q. Do you know of any reason that was stated by either Mr. Avery in Mrs. Avery's presence or by Mrs. Avery alone why that property should go to the Smithsonian Institute and not elsewhere?

Mr. MACKEY: To the answer to the previous question I wish to enter an objection upon the same ground, that the statements of the parties cannot be received to contradict the express language of the deed, and I object to this question for the same reason and also as leading.

Mr. HACKETT: Then I will change that question.

Q. What was said, if anything, by Mr. Avery in Mrs. Avery's presence or said by Mrs. Avery alone why the property should go to the Smithsonian Institute and not elsewhere?

Mr. MACKEY: Same objection.

A. The reasons assigned seemed to be that the property was bought and paid for by Mr. Avery's money, and he was anxious that the fund he should leave for the benefit of science should be large as possible so as to be as beneficial as possible for the purposes for which he left it, and he did not contemplate that it should be diminished by the amount of money invested in this property in any way.

Q. Do you know as matter of fact how Mr. Avery's money was obtained?

Mr. MACKEY: I object to the witness giving his opinion.

A. I think the most of it was obtained by rigid economy in the saving of his salary under the Government. He occupied his position for thirty-two years, and while his salary was not a very large one, he received two thousand dollars a good portion of the time, and he lived very economically indeed, both himself and his wife, and the money he received in that way he invested in various investments, and then he was able to accumulate from those sources. He was very poor when he came to Washington.

Q. Had he any children?

A. No.

Q. Whether Mrs. Avery ever said anything to you in the line of carrying out this agreement entered into at the time this property was bought?

Mr. MACKEY: Objected to as leading and incompetent, as calling for statements, made after the date of the deed, and on the ground that it is incompetent to contradict the express terms of the deed by such oral testimony.

43 A. Yes; she spoke of doing so on various occasions, and invariably said that she had a reluctance to making a will, but hoped to do so before she got to be incompetent to make one; that there was no hurry for it; that she was in comparatively good health, able to help herself in every way, and that it being very unpleasant for her to make one she would delay it until a convenient time or until it became necessary to make one.

Q. How much older was Mr. Avery than his wife?

A. I think about twenty years, or nearly so. He was considerably older—fifteen or twenty years older, you might say.

Q. Do you know how old he was when he died?

A. He was born May 1st, 1808, and he died, I think, in 1894; I do not remember just when, but in the fall of 1894, I think; so that he was in his 87th year.

Q. Were you ever called upon to witness a will or codicil of Mr. Avery?

A. Yes; both.

Q. I hand you what purports to be a will of Mr. Avery, dated September 13, 1882, in his own handwriting apparently, and witnessed by James A. Tait, Morgan F. Mount, and Leland P. Shidy, and ask if that is your signature.

A. Yes.

Q. Do you recollect the fact that you did attest that will with those gentlemen?

A. Yes.

Q. What do you know of the other two witnesses?

A. Both of those gentlemen are dead.

Q. Next a codicil written by Mr. Avery, dated May 19, 1893, and

witnessed by Leon L. Frederich, Leland P. Shidy, and Joseph M. Johannes. Is that your signature?

A. Yes.

(NOTE.—Mr. Mackey here admits upon the record that said codicil was duly executed.)

Q. Now, a typewritten codicil dated December 20, 1892, and witnessed by James A. Tait, yourself, and John F. Cox. Do you recognize that as your signature and make the same statement as to its attestation?

A. Yes.

(NOTE.—Mr. Mackey here admits upon the record that said codicil was duly executed, and it is agreed between counsel that the exhibit attached to the bill is a copy of said will and codicils, and that the original papers can be produced at the request of counsel at the hearing of this cause.)

Mr. MACKEY: While I agree that a copy may be substituted for the original of this paper, I object to the original paper as incompetent and irrelevant.

Q. I show you a paper purporting to be in the handwriting of Mrs. Lydia T. Avery. Did you ever see her write?

A. Yes.

44 Q. Are you familiar with her handwriting?

A. Yes.

Q. Is that paper in her handwriting?

A. Yes.

Q. The whole of the paper?

A. Yes; as near as I can judge. I do not profess to be an expert in handwriting, but I think that is in her handwriting.

Mr. HACKETT: I here give that paper in evidence.

Mr. MACKEY: To the admission of which I object as irrelevant and incompetent and not sufficiently proven.

(NOTE.—And the same is herewith filed in evidence and marked Exhibit A. H. No. 3.)

EXHIBIT A. H. No. 3.

Filed October 25, 1895.

WASHINGTON, *Oct.* 26, 1885.

The rent was paid the 17 of A. to T. Sands; the deed received the 20 of April; the tax bill of $13.91 was paid May 1st and May 28. We loaned $12.50 with the promise that Mr. T. Sands would bring this money himself, but, failing to do *do* so, will *will* Mr. Hazelton please make it right to us.

Amount due for rent	$23 36
" " tax	13 91
" " loaned	12 50
	49 77

Please send the papers. They are invaluable to us.

MRS. L. T. AVERY.

Mrs. Avery wishes you would oblige us just now, if you can arrange with the bearer, Mr. R. S. Avery. Perhaps some time we may be of service to you. The money and papers are valuable to us just now.

L. T. AVERY.

Q. After Mrs. Avery's death were you applied to by Mr. Avery to make an affidavit with reference to the ownership of this property?

A. Yes.

Cross-examination.

By Mr. MACKEY:

Q. State whether or not Mr. and Mrs. Avery lived in this property at the time of its purchase.

A. No; they lived next door to this property—that is, next door in a general way, there being a vacant lot between them, but it was what they regarded next door. It was the adjoining house, with a vacant lot between.

45 Q. How long after the purchase of this property was it before they moved into it?

A. They never lived in this house.

Q. But they always lived next door to it?

A. Yes; from the time they were married. He built the house before they were married and she came down to occupy it.

Q. Did you know Mr. Avery before his marriage?

A. No; I only got acquainted with him after his marriage; but he told me, of course, of the history of his life, and that is the way I know about his marriage.

Q. He occupied the house next door from the time of his marriage?

A. Yes.

Q. Do you know whether any money came to him through the marriage of his wife?

A. As far as I ever knew, I think there was none.

Q. You never heard him or her speak of it?

A. No; and from the fact that her father was a clergyman, and especially a country clergyman, it is probable that he was not too well off.

Mr. MACKEY (interposing): Do not argue the matter.

Mr. HACKETT: No; just state the fact as you know it.

WITNESS: I can testify positively that they never spoke of any such thing to me or in my presence.

Q. You do not know whether she ever had a bank account in Norwich, Connecticut?

A. No; I do not know anything about that.

Q. They never spoke to you about it?

A. Never.

Q. Do you know the time they purchased this property?
A. I did know it.
Q. I do not mean to ask you the date, but do you know of the circumstance of the purchase?
A. Yes.
Q. How long after the purchase was it that these conversations which you have undertaken to relate as having been had between yourself and Mr. and Mrs. Avery took place?
A. Some of them took place before the purchase and some after.
Q. Those that took place after were how long after?
A. They were scattered along all the time from the time of the purchase until shortly before her death. The last one, I think, was two weeks before her death.
Q. How many years after the purchase?
A. I think five years after the purchase. I think it was in 1885 they purchased the property, but I may be entirely wrong about that. I do not profess to know now the date of the purchase. She died somewhere about 1892. It may have been seven years afterwards.
Q. With whom were your conversations held, Mr. Avery or Mrs. Avery?
46 A. With both of them, usually. They would both be present in the room and join in the conversation at the time, so that it would be hard to separate one from the other.
Q. Always both present?
A. Yes.
Q. You never had any conversation with either of them alone?
A. Not in reference to this subject.
Q. You say that Mrs. Avery wanted the title placed in her name because the property was contiguous to her own home?
A. Yes.
Q. What do you mean by her own home?
A. The home that Mr. and Mrs. Avery enjoyed in common together; of course it was his home, and she being his wife it was her home.
Q. She wanted, you say, the title to the property in her name so that she could control it?
A. Well, she had been very much annoyed by parties living in the house before as tenants, and she thought, I suppose, that if she owned it she could control it in that respect better than if the title was in his name, and she thought, for some reason, it would be pleasanter to have it in her name, and he was willing to please her.
Q. What you are now testifying is just your conclusions from the conversations which they had in respect to the property?
A. Yes, and the discussions which took place in my presence.
Q. From those conversations you draw these conclusions which you have stated about what Mrs. Avery thought?
A. Yes.
Q. You do not undertake to give the conversations which they had?
A. Not at all. I do not pretend to give an exact verbal statement

of what took place at the time, because these events occurred something like ten years ago, and my memory of them would not be vivid enough to give the precise words; but I am very confident in regard to the tenor of what was said and done at the time.

Q. This is just your best recollection of the tenor of the conversations?

A. Yes.

Q. Was there anything about those conversations calculated to impress them upon your memory any more than any other conversation you had with them?

A. Nothing except my interest in the parties between whom the conversations occurred as friends of mine.

Q. Well, you would have the same interest in any other conversation which took place between them, sitting there in the house and having social converse together?

A. Only there is a difference in the importance attached to various classes of conversations; a conversation touching title to property is of more importance or consequence than a conversation in regard to some trivial thing, and on that account weighed more
47 with me than would have merely a discussion of some ordinary occurrence. They were not buying property every day, while discussions about a thousand petty little things in the multitudinous affairs of life would not impress me at all.

Q. You were, of course, a warm friend of Mr. Avery?

A. Yes; of both of them.

Q. You have read his will, have you not?

A. Yes; I read it before I signed it—all his wills.

Q. You know of the language used by him in his last will in regard to this particular piece of property and what disposition he wanted made of it?

A. Yes.

Q. And you would like to see that disposition of the property carried out?

A. I have no interest in it whatever. It is entirely a matter of indifference to me whether it is carried out or not; in fact, I would have some sympathy for the other side for the reason that I have had a personal acquaintance with Mrs. Avery's brothers, one of them being a clergyman living in Vineland, New Jersey, and the other, whose name I think is Levi, living in Connecticut and the actuary for an insurance company, and I found them to be very pleasant and genial gentlemen, and I would be very sorry to have them deprived of the benefit of this property if it were not simply a question of fact to certify to here, and I cannot do other than testify as seems to be the case. So far as my personal feelings in the matter are concerned, I would a good deal rather testify on the other side, and especially in a matter where Mrs. Avery's relatives would be benefited by having the property on their side. I should say, by all means let them have it if such is the case, and I would like to turn around and give them the benefit of it.

Q. Do you remember the time when they went down to purchase this property and get the deed for it?

A. Yes; I recall the time. I cannot recollect the date, but I know the time they did it.

Q. What time of day did they go?

A. As to the time of day I do not know. I thought you meant the general time. I was in my office at the time.

Q. Do you know to whose office they went?

A. No.

Q. Do you know from whom they bought the property?

A. Mr. Sands it was who owned it. I do not know what his first name was; they so frequently referred to him in their conversations, and he is the only one whose name I can recollect they did refer to; they may have referred to others and their names slipped my memory, but I remember the name of Mr. Sands because I knew a man by the name of Sands.

Q. Do you know through whom the property had been bought?

A. No.

Q. Do you know at whose office the transaction was consummated?

A. No.

48 Q. Do you remember as matter of fact their going off on a certain day to consummate that sale?

A. No; I do not.

Q. All you know about it is what you learned from them afterwards?

A. Yes; before and after.

Q. You say it was Mrs. Avery's desire that she should control the property after Mr. Avery's death?

A. Yes; during her lifetime.

Q. And if she should die before Mr. Avery it was her desire to control the property during her lifetime?

A. Yes.

Q. I understood you to say that she was much *yonder* than he?

A. Yes.

Q. Was there anything said by her in respect of his likelihood of dying before her?

A. She very often spoke of that; that she was younger, and she thought he would die before she did. In fact, they were both confident of that.

Q. And that was one of her reasons for wanting this property placed in her name?

A. Yes. For the last twenty years of his life he was subject to severe spells of illness, which seemed to be mainly from indigestion, and at times it brought him quite low, and she was afraid he would be carried off a number of times, while during all that period she was younger, able to be around, and was not in any immediate apprehension of death, as he had been.

Q. Are you able to state with any degree of positiveness that this paper (Exhibit A. H. No. 3) is in the handwriting of Mrs Avery?

A. Yes; as much as I could certify to any handwriting at all, I should say that was Mrs. Avery's handwriting. I am not, as I said before, an expert in handwriting, but unless I am positively mis-

taken, according to all ordinary probability, that is certainly her writing.

Redirect.

By Mr. HACKETT:

Q. You recognize this as the affidavit which you made?
A. Yes, sir; that is my signature.
Q. What is the date of it?
A. November 26th, 1892.

Recross.

By Mr. MACKEY:

Q. You made this affidavit at the request of Mr. Avery?
A. Yes.
Q. After the death of Mrs. Avery?
A. Yes.

49 Q. Before you made this affidavit he made known to you, did he not, what he desired to establish?
A. Yes; he discussed the matter with me.
Q. What did he say to you afterwards?
A. He asked me what I recollected in regard to the conversations at the time and preceding the purchase and what I would be willing to state in regard to it at that time.
Q. Did he call your attention to certain conversations that had been had—what he had said and what she had said?
A. No; he did not refresh my memory in any way in regard to anything that was said and done, but simply asked me if I remembered what had been done.
Q. Why did he tell you he wanted you to make the affidavit?
A. Because he was afraid there might be trouble over the transmission of this property to the Smithsonian Institute in consequence of it having been put in his wife's name and she leaving no will.
Q. He stated to you that he desired to establish the fact that it was his money that had purchased it and his desires and his wife's desires in regard to the property?
A. Yes; that it should go as the rest of the property goes.
Q. And that he desired your affidavit for the purpose of establishing the fact, if it could be so established, that it was the desire of his wife that this property should go in this way?
A. Yes.
Q. And that was the purpose for which you made the affidavit?
A. Yes.

LELAND P. SHIDY.

Subscribed and sworn to before me this 18th day of June, 1895.

ALBERT HARPER, *Examiner.*

(Adjourned.)

FRIDAY, *October* 4, 1895—4 o'clock p. m.

Met pursuant to agreement.

Present: Frank W. Hackett, Esq., solicitor for the complainant; Messrs. Chase & Maish, solicitors for the defendant Julia N. Avery, executrix; Franklin H. Mackey, Esq., solicitor for the other defendants; also the examiner, and—

JULIA C. BRADLEY, who, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. What is your name and where do you live?

A. Julia C. Bradley; No. 720 C street northeast, in this city.

Q. Did you know the late Robert Stanton Avery and his wife, Lydia Tyler Avery?

A. I did.

50 Q. How did you happen to know them?

A. Through a business transaction, in renting a house from them.

Q. What house did you rent from them?

A. The cottage 120 B street northeast, in this city.

Q. And for how long a time did you rent that house?

A. About four years.

Q. Between the years 1883 and 1887, was it not?

A. Yes.

Q. During that time, between 1883 and 1887, and up to November, 1889, whether or not you frequently met and talked with Mrs. Avery?

A. I did.

Q. Whether or not you ever had any talk with Mrs. Avery with reference to the ownership of the house No. 326 A street southeast, in this city?

Mr. MACKEY: Objected to as leading.

A. I had no conversation with her about it. She made the remark that it was in her name.

Q. Go on and state what you heard her say about the ownership of that house.

A. I do not remember the conversation. I do not remember that we had any conversation, only she often spoke of it being her house; she would just speak about the young lady "living in my house" (I have forgotten her name)—home or *ka*use. That is the way she would speak of it.

Q. Did you live in that house?

A. No, sir.

Q. I want to know if you ever heard Mrs. Avery say anything about the ownership of the house 326 A street southeast, in this city; if so, what was said about it?

A. She called at her house individually; that is all I heard her say about that property. She always called it her house, but I knew through others how she bought or purchased it. I never knew through her that she had a dollar outside of Mr. Avery.

Q. Will you look at that affidavit and state if you signed and swore to it?

A. Yes, sir; that is my signature.

Mr. HACKETT: Examine that affidavit.

Mr. MACKEY: I object to the affidavit being put in the witness' hand and being requested to examine it. I do not know what the contents of the affidavit are, and unless this affidavit is going to be offered in evidence I want to——

Mr. HACKETT (interposing): I will offer the affidavit in evidence. It is now given to the witness to refresh her memory.

Q. Have you read that affidavit?

A. Yes; I have read part of it; the other part I know.

Q. I will now ask you whether or not you remember anything said by Mrs. Avery with regard to the ownership of the house that this affidavit refers to.

51

Mr. MACKEY: What house does the affidavit refer to?

Mr. HACKETT: No. 326 A street southeast, in this city?

A. I know she always called it her house, but that is all I know.

Q. Is that all you remember she ever said about it?

A. Yes. She said in May, 1887, that it was the wish of herself and Mr. Avery that their property should go to the Smithsonian Institute for the advancement of science.

Mr. MACKEY: I object to the answer and here give notice that I will move the court to strike it out as being irrelevant and inadmissible.

Q. Did Mrs. Avery ever talk with you confidentially about that property?

Mr. MACKEY: Objected to.

A. No.

Mr. HACKETT: Counsel here stops because he is taken by surprise by the witness and here gives in evidence the affidavit referred to.

Mr. MACKEY: For what purpose?

Mr. HACKETT: I offer the affidavit in evidence because I am taken by surprise by the witness and I desire the court to see it.

(NOTE.—Said affidavit is herewith filed in evidence and marked Exhibit A. H. No. 4.)

EXHIBIT A. H. No. 4.

Filed October 25, 1895.

Affidavit of Mrs. Julia C. Bradley.

Mrs. Julia C. Bradley, residing at No. 720 C street northeast, in the city of Washington, District of Columbia, being duly sworn according to law, deposes and says that she rented from Robert S. Avery the premises known as No. 120 B street northeast for the four years between 1883 and 1887, and during that time and up to November, 1890, frequently met with and talked with Lydia T. Avery, his wife, who usually collected the rent and attended to the business of the tenancy; that in the many conversations which took place between them the said Lydia T. Avery became confidential and told of her private affairs touching the property that her husband had accumulated by his earnings, and especially the parcel known as No. 326 A street southeast, which she said he had permitted her to take in her own name, although paid for with his money, but that it, together with all the other property, was to go to the Smithsonian Institute for the benefit and promotion of science after their death; that Robert S. Avery had made his will to
52 that effect, and upon the death of either the survivor was to enjoy the estate during life and then its disposition was to be as above indicated; that Mr. and Mrs. Avery had no children, and the dream of their lives seemed to be concentrated in this arrangement of their property; that the said Robert S. Avery had spent many years of his life in the study of scientific matters and treasured as a hobby the publications and adoption for general use of his phonetic alphabet and books.

Affiant further states that the said Lydia T. Avery departed this life on or about the 18th day of November, 1890, and that she has no interest, either directly or indirectly, in the matters herein mentioned.

JULIA C. BRADLEY.

Subscribed and sworn to before me this 12th day of December, 1892.

[SEAL.] MARTIN L. WELFLEY,
Notary Public.

Cross-examination.

By Mr. MACKEY:

Q. Who drew up this affidavit?

A. I have forgotten the party's name, but I would know the name if I heard it called.

Q. Was it a Mr. Langley?

A. I do not know. There is a gentleman on Capitol Hill who swore me, but I do not know his name.

Q. Was it not Mr. John F. Cox, a lawyer?

A. I have forgotten.
Q. Did he have a black mustache?
A. I have forgotten. It does not seem to me that is the name of the party who swore me.

(NOTE.—It is here agreed between counsel that said affidavit is in the handwriting of John F. Cox.)

Q. It was written out and presented to you to sign?
A. It was not written out on the first visit.
Q. It was not written out in your presence?
A. No.
Q. Then it was brought to you and you were asked to swear to it?
A. Yes.
Q. You had a talk with him when he first came there on his first visit?
A. Yes.
Q. And you told him substantially what you have told here today?
A. Yes.
Q. And then he brought back this affidavit and asked you to sign it?
A. Yes.
53 Q. And then you signed it?
A. Yes.
Q. Do you remember whether or not you read it over, or did he read it to you?
A. My recollection is that I was suffering with my eyes and could not read.
Q. Did he read it to you?
A. Oh, every word, I suppose; that is my recollection.

Redirect.

By Mr. HACKETT:

Q. Do you recollect now that at the time you signed this affidavit the statements contained therein were true?
A. Yes.
Q. In this affidavit you say that Lydia T. Avery became confidential and told you of her private affairs touching the property that her husband had accumulated by his earnings, and especially the parcel known as No. 326 A street southeast, which she said he had permitted her to take in her own name, although paid for with his money, but that it, together with all the other property, was to go to the Smithsonian Institute for the benefit and promotion of science after their death, and that Mr. Avery had made his will to that effect, and upon the death of either the survivor was to enjoy the estate during life and then its disposition was to be as above indicated. Do you recall the fact about that?
A. The latter part is *verbatim*, but I do not remember ever having

any conversation with Mrs. Avery about the ownership of that house.

Q. What do you mean by "the latter part"?

A. In 1887 she said that she and Mrs. Avery wished that their property should go to the Smithsonian Institute.

Q. Whether it is true that Mrs. Avery became confidential with you and told you of her private affairs touching the property that her husband had accumulated by his earnings, and especially the parcel known as No. 326 A street southeast, which she said he had permitted her to take in her own name, although paid for with his money, but that it, together with all the other property, was to go to the Smithsonian Institute for the benefit and promotion of science after their death?

A. No, sir; I do not remember a word of that.

Q. When you made this affidavit——

A. (Interposing.) If it was read to me in that form, I do not remember a word of it, because I never heard her say so.

Q. Did you not tell me in this office about half an hour ago that this affidavit was true?

A. I told you that Mrs. Avery said their wish was that their property should go to the Smithsonian Institute.

Q. Did you not read this affidavit, or I read it to you, half an hour ago in this office, and did you not then tell me that the statements contained in that affidavit were true?

54 A. The latter part of it is true. I do not remember one word about any conversation being in there, because I never had any conversation with Mrs. Avery about that house in my life.

Q. Is all that is contained in this affidavit as to confidential conversation untrue?

A. She told me of her private affairs a hundred times, but she never told me about the particulars of the purchase of that house.

Q. Now, I understand you to say that Mrs. Avery never told you of the particulars of the purchase of that house. I never asked you that. Did she ever tell you anything about the ownership of that house?

A. She called it her house.

Q. Was anything said about what would become of it at her death?

A. No, sir; only in 1887, when she made the remark that it was the wish of Mr. Avery and herself that their property should go to the Smithsonian Institute for the advancement of science.

Mr. MACKEY: Objected to as inadmissible, and I here give notice that I shall move the court to strike out that question and answer.

Q. How did she come to tell you that?

A. Well, she did it in her voluminous way of talking. I did not ask any questions.

Q. Did she ever say anything as to the terms of Mr. Avery's will?

Mr. MACKEY: Objected to as leading.

A. My understanding was that his will was not made.

Q. Do you recollect when this conversation took place?

Mr. HACKETT (to witness): When I use the word "conversations" I do not mean necessarily that you said anything when Mrs. Avery got to talking about that house. You may not have said a word and she may have done all the talking, and yet it might be termed a conversation between you; that is what I refer to. When was it?

A. Every time I met her. I do not think I ever met her that she did not say something about "my house." I got a tenant for it and she was always grateful to me for it.

Q. I am not speaking about her house. I am speaking about her saying anything about who paid for that house.

A. I know nothing about that.

Q. She never said anything to you about who paid for that house?

A. We had no conversation about that.

Q. Did she ever say anything to you about who paid for that house?

A. I didn't know that she ever had a dollar except what was Mr. Avery's money.

55 Q. Did she ever say anything to you about who paid for that house?

A. No, sir. JULIA C. BRADLEY.

Subscribed and sworn to before me this 4th day of October, 1895.
ALBERT HARPER, *Examiner.*

Mr. Hackett, solicitor for the complainant, here gives in evidence affidavit of Robert Stanton Avery, subscribed and sworn to before Robert V. Hughes, notary public, on the 15th day of November, 1892, a copy of which affidavit is incorporated in this record, at pages 55 and 56, and which it is agreed between counsel for the respective parties may be referred to and read in evidence in lieu of the original thereof, subject to the objection hereinafter noted; and it is further agreed that if the said Robert V. Hughes, notary public, were called as a witness he would testify that he took the acknowledgement of the said Robert Stanton Avery on the 15th day of November, 1892, to said affidavit.

Mr. MACKEY: I, however, as solicitor for those of the defendants represented by me, object to the admission in evidence of said affidavit because irrelevant and *ex parte* and because it is a declaration of the said Avery made by him after the conveyance of the property to his said wife and after the death of said wife.

Mr. Hackett, solicitor for the complainant, here closes the testimony in its behalf.

Mr. MACKEY: Without a formal session for the introduction of testimony on behalf of those of the defendants whom I represent, I here give in evidence on their behalf a certified copy of the account of Lydia T. Meech, No. 9247, with the Norwich Savings Society, and also of the account of Lydia T. Avery (*née* Meech), No. 51828, with said society.

Mr. Hackett, solicitor for the complainant, admits that if Costello Lippitt, treasurer of said society, were called as a witness he would

testify that said transcripts from the books of said institution are copies of said accounts, but objection is made to the admission in evidence of said transcripts of account because irrelevant.

(NOTE.—And said transcripts are herewith filed in evidence and marked together as Exhibit A. H. No. 5.)

56 EXHIBIT A. H. No. 5.

Filed October 25, 1895.

#51828.

DR. *Mrs. Lydia T. Avery in Ac. with Norwich Savings Society.* CR.

1890.			1877.		
July 1.	To balance down.....	997 39	May 31.	By transfer.....	$576
			1886.		
			Jan. 1.	" dividends to date..	258 67
			1890.		
			Jan. 1.	By dividends to date..	143 18
			1890.		
			July 1.	By dividends to date..	19 54
		997 39			997 39
			1890.		
			July 1.	By balance.....	997 39

I, Costello Lippitt, treasurer of the Norwich Savings Society, certify that the foregoing is a correct statement of the account of Lydia T. Avery to July 1st, 1890, with said society.

COSTELLO LIPPITT, *Treas.*

#9247.

DR. *Lydia T. Meech in Ac. with Norwich Savings Society.* CR.

1856, Sept.	24.	To cash.....	8 27	1850, Oct. 1.	By cash..... 30 "
1858, July	14.	" "	54 60	1851, Jan. 1.	" dividend..... 45
Sept.	27.	" "	20 "	July 1.	" " 90
1859, Jan.	24.	" "	5 60	1852, Jan. 1.	" " 93
May	2.	" "	18 59	"	1. " cash..... 20 "
Aug.	26.	" "	14 37	July 1.	" dividend..... 1 56
"	"	balance.....	575 "	1853, Jan. 1.	" 1 59
				July 1.	" 1 65
				1854, Jan. 1.	" 1 71
				July 1.	" 1 74
				Oct. 3.	" transfer..... 400 "
				1855, Jan. 1.	" dividend..... 13 80
				July 1.	" 14 22
				1856, Jan. 1.	" 14 64
				July 1.	" 15 09
				1857, Jan. 1.	" 15 30
				July 1.	" 15 75
				1858, Jan. 1.	" 16 23
				"	4. " cash..... 20 "
				July 1.	" dividend..... 17 31
				1859, Jan. 1.	" 15 60
				July 1.	" 13 25
				1860, Jan. 1.	" 16 29
				July 1.	" 16 77
				1861, Jan. 1.	..... 17 28
				July 1.	" 14 37
		$696 43			$696 43

57 Dr. Cr.

1862, Jan.	3.	To cash.....	25 "	1861, Aug.	26.	By balance.....	575 "
Sept.	22.	" "	25 "	1862, Jan.	1.	" dividend....	17 25
1865, Jan.	5.	" "	785 40	July	1.	" "	14 17
				1863, Jan.	1.	" "	17 43
				June	24.	" cash	130 "
				July	1.	" dividend....	14 95
				1864, Jan.	1.	" "	21 54
				July	1.	" "	22 20
				1865, Jan.	1.	" "	22 86
			$835 40				$835 40

I, Costello Lippitt, treasurer of the Norwich Savings Society, certify that the foregoing is a correct statement of the account of Lydia T. Meech, dec'd, with said society.

COSTELLO LIPPITT, *Treas.*

Endorsement.

Oct. 14, 1895.

The pl'ff admits that the within copy is a true transcript of the account of Lydia T. Avery (formerly Lydia T. Meech) with the Norwich Savings Society.

FRANK W. HACKETT, *For Pl'ff.*

Mr. Mackey: I have no further proof to offer in behalf of those of the defendants whom I represent.

ALBERT HARPER, *Examiner.*

I hereby certify that the foregoing depositions (comprising sixty-three typewritten pages) were taken down by me in shorthand as an examiner in chancery from the statements when and as uttered by the deponents thereof; that the same were thereafter transcribed by me and reduced to typewriting, and thereupon read and subscribed by the respective deponents thereof in my presence.

I further certify that my fee of $40.00 for taking, certifying, and returning said depositions has been paid to me by the complainant.

And I further certify that I am not of counsel nor in anywise interested in this cause.

ALBERT HARPER,
Examiner in Chancery.

58 *Decree.*

Filed January 27, 1896.

Supreme Court of the District of Columbia.

The Smithsonian Institution *vs.* Levi W. Meech *et al.* } Eq. No. 16496.

Decree.

This cause, coming on to be heard at this term, was argued by counsel; and thereupon, upon consideration thereof, it is adjudged,

ordered, and decreed as follows this 27th day of January, A. D. 1896:

First. That the title to the premises described in the bill—that is to say, to part of lot two (2), in square seven hundred and eighty-seven (787), in the city of Washington, and part of lot lettered "I," as described in deed of Timothy Sands to Lydia Tyler Avery, recorded in Liber 1118, fol. 278, of the land records of the District of Columbia, be, and the same is hereby, vested in the complainant, The Smithsonian Institution, upon the trusts declared by said will, its successors and assigns, free from all claim of every description on the part of the defendants or any of them.

Second. That the defendants, Levi W. Meech, Stephen T. Meech, William W. Meech, and Lucy M. Lord, be, and each of them is hereby, enjoined perpetually from asserting title to the said premises by themselves or agents or representatives as heirs-at-law of the said Lydia Tyler Avery.

Third. That the said defendants, Levi W. Meech, Stephen T. Meech, William W. Meech, and Lucy M. Lord, shall within sixty days from this date execute a conveyance, by way of quitclaim and release, of the above-described lot to the complainant Susan Maria, wife of said Levi; Jaennette, wife of said William W., and James Lord, husband of said Lucy, joining therein, and upon the neglect or failure of said defendants to execute said conveyance within the time herein limited this decree shall operate as such conveyance would do.

Fourth. It is further adjudged, ordered, and decreed that the defendant Julia N. Avery, executrix, be, and she is hereby, authorized and directed to treat the one thousand dollars ($1,000) bequeathed to the said defendants as forfeited for breach of condition annexed to said gift and as having fallen into the residuum and become payable to the complainant unless the said defendants within said sixty days shall signify in writing, to be filed in this court, their intention to comply with the requirement by this decree upon them imposed and their relinquishment of all claim to said premises, as above provided, and in such event the said legacy shall stand as freed from so much of this decree as declares a forfeiture of
59 the same, and they shall thereupon be entitled to receive the said legacy and be free from costs of this suit.

Fifth. The complainant is awarded the costs of suit, except in the case provided in the last foregoing clause of this decree, in which case complainant shall pay all costs.

A. B. HAGNER,
Asso. Justice.

Opinion of Court.

Filed January 25, 1896.

THE SMITHSONIAN INSTITUTION
v.
LEVI W. MEECH *et al.*
} No. 16496. Equity.

The 7th item of the will of Robert S. Avery, dated 22nd of July, 1893, is as follows: "All the rest and residue of my estate, of whatsoever nature, real, personal, or mixed and wheresoever situate, I hereby give, devise and bequeath unto the Smithsonian Institution, a body corporate by virtue of the laws of the United States, of which institution Samuel P. Langley is now secretary, having its legal residence in the District of Columbia, unto it and its successors forever.

"Having always had a love for the sciences and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded that the residuary gift above made to the Smithsonian Institution will best express my interest in science. As my labors have been directed to the invention and use of phonetic type, I desire but do not require, that the income derived by the Smithsonian Institution from this gift, may be applied, so far as it may determine, to promoting publications in such type of scientific publications, especially of such publications as may relate to phonetic type and printing. I also desire, but by no means require, that such part of said income as the said institution shall determine, shall be applied to the publication of lectures and treatises upon and concerning those mechanical laws governing *and* an etherial medium, which are treated of in atomic chemistry and which are supposed to govern phenomena of electricity, magnetism, light and heat. Prizes might be given for essays on these subjects and upon such other kindred subjects as may meet the approval of the institution. I would like however to have published first the multiplying tables and also IV place logarithms, publication of the table of squares, cubes, square roots, cube roots, reciprocals, prime numbers and factors, some of which I have written out. If the institution shall approve, the fund derived from the residuary bequest shall be called 'the Avery fund' or 'the fund contributed by Robert S. Avery and his wife Lydia T. Avery, for the extension of the sciences,' and all publications made from the fund shall bear this inscription.

"The property known as part of lot 2 (two) in square 787, in the city of Washington, D. C., being premises No. 326 A St.,
60 S. E., is my property although the title stands in my wife's name. I include it in the residuary bequest to the Smithsonian Institution."

The bill charges that the lot on "A" street had been purchased in 1885 from Timothy Sands by Mr. Avery, who paid the entire purchase-money from his own funds, but by his permission it had been

conveyed to his wife, Lydia T. Avery; that by agreement between husband and wife at the time, the wife after his death was only to enjoy a life estate in that lot, which at her death, if she should survive him, was to vest at once in the officers of the Smithsonian Institution, with all the residue of his property not otherwise disposed of by his will; that the wife died in 1890 without having made a will or other transfer of the property, but always having recognized that agreement and promised to perform whatever act might be requisite to affect that purpose; that the officials of the Smithsonian Institution have accepted the provisions of the will in their favor and are in possession of the lot on A street, but that the defendants, the heirs-at-law of the wife, although they claim the legacy given to them by the will, are disputing the devise therein to complainants of the lot on A street, by reason whereof the shares of defendants in the legacy to them belong to complainants according to its provisions. The bill further alleges that Robert S. Avery had for many years resolved to leave his property to the institution, and with that view had executed a will of the 22nd September, 1882, by which he devised and bequeathed all his property (not otherwise disposed of specifically) for that purpose, though leaving it all to his wife for her life; that the husband always regarded the said lot as his property and dedicated to his wife for her life (only in case she should survive him), and the wife, as long as she lived, always acknowledged that such were the terms upon which it was held, and repeatedly made statements to that effect to her friends before and after the execution of the deed of 1885, and had requested an attorney to prepare a will for that purpose, but her sudden death prevented the execution of such an instrument.

The bill prays it may be decreed that the equitable title in the lot on A street remained in Robert S. Avery and at his death became vested in the complainants for the purposes indicated in the will; that the defendants may be enjoined from claiming title to said property as heirs of Lydia T. Avery; that the executrix of Robert S. Avery may be directed to treat the one-thousand-dollar legacy to defendants as having become forfeited for breach of the condition annexed thereto, and as having fallen into the residue for the benefit of the complainants, and that defendants may be required to execute a deed of the lot to complainants.

The defendants answered, and testimony was taken by complainants, but no testimony was adduced on the part of the defendants.

Besides the oral testimony in behalf of complainants, there were filed under the commission the will of Avery of 1882, before referred to; another will executed in December, 1892, reciting the death of his wife without having made a will, and the circumstances
61 and agreements attending said purchase and deed, and again making the same disposition to the complainants; also a first and second codicil to said will, reiterating the recitals and provisions therein in different language, and also the deed of 1885, and the last will of July, 1893.

The case has been well argued and carefully considered.

It is satisfactorily proved in the case that the entire purchase-

money for the A Street property was derived by the husband from his own earnings and in no degree from any property or funds of the wife; that the payment of the entire purchase-money (except of the $600 trust on the property, which was then assumed by Mr. Avery) was contemporaneous with the purchase and the delivery of the deed is shown by the testimony of Mr. Hazelton (Testimony, p. 3), and the note was paid by Mr. Avery to the holder several months before it fell due, as is shown by the testimony of Mr. Brush (page- 32–'3).

This proof fulfils the requirements of the rule that the payment should be made by the beneficiary as a part of the original transaction of purchase, "or that an absolute obligation to pay should be incurred by him" at that time, as is stated by Pomeroy, vol. 2, sec. 1037.

The familiar principles of law governing the case of a resulting trust are well settled. In accordance with them, if the grantee in the conveyance from Sands of the 10th of April, 1885, had been a stranger to Mr. Avery, under the circumstances above mentioned a resulting trust would have arisen immediately from the transaction itself, and the person named in the conveyance would have become a "trustee for the party from whom the consideration proceeded."

1 Perry on Trusts, sec. 126.

On the other hand, the circumstance that the grantee is the wife of the party who paid the money creates ordinarily the presumption that the conveyance was intended as an advancement to her, and rebuts the idea of a resulting trust "as a circumstance of evidence."

1 Perry, sec. 143.

"The question is thus resolved into one of intent," 2 Cox, 94, Dyer *v.* Dyer, "and evidence must, of course, be admitted on the other side."

That parol evidence of incidents or facts tending to contradict the idea of an advancement is admissable is well settled, though the incidents and facts should be so closely connected with the date of the purchase "as to be fairly considered a part of the transaction," whether they be antecedent, coincident, or subsequent. "So the declarations *of the real purchaser*, either before or at the time of the purchase, may be received to show whether he intended it as an advancement or a trust. Such declarations are received, not as declarations of a trust by parol or otherwise, but as evidence to show what the intention was at the time. They are parts of the transaction or words accompanying an act."

62 "And the after declarations *of the nominal grantee* may be used *against* him, but not *in his favor;* but the declarations must be direct and certain, and where possible should be corroborated by other facts and circumstances, for courts will not act upon mere declarations if they are conflicting, vague, or inconsistent with themselves."

Id., sec. 147.

"Thus, if there is any circumstance attending the purchase which explains why it was taken in the wife's or child's name and shows it was not intended to be an advancement, but was intended to be a trust for the husband or father, the presumption of an advancement will be rebutted and the inference of a trust will be established."

Id., sec. 146.

"A conveyance to a wife or child will be presumed to carry a beneficial interest, but such consideration is only a circumstance of evidence. * * * The heir is not to be excluded from a resulting trust upon bare conjecture. There must be positive evidence of a benefit intended to the devisee, and not merely negative evidence that none was intended for the heir. * * * But in no case will the court permit the grantee to retain the beneficial interest if there was any mistake on the part of the grantor or any fraud on the part of the grantee."

1 Perry, sec. 151.

If the widow were alive, resisting the present claim to the property, these principles would be applied in the determination of the contentions of the parties, as has been held in numerous cases.

Thus, in 20 Eng. Equity Cases, 328, Marshall *v.* Crutwall, a husband in failing health directed the manager of a bank where he had kept his account to open an account in the joint names of himself and wife and to honor any checks drawn by either, and remarked at the time that the balance of the account would belong to the survivor, of himself and wife. After this time all checks were drawn by the wife and the proceeds applied to household expenses. By his will he appointed his wife and the defendant his executors. A large sum remained to the credit of the account, which the wife claimed as her own. The court held that under all the surrounding circumstances the arrangement at the banker's should be considered as a mode of conveniently managing the husband's affairs and was not intended as a provision for the wife, and that the wife was not entitled to the fund.

The principles were applied in a case in this District where property was bought and paid for by the husband and conveyed to the wife upon the agreement that she should execute a will leaving it to him after her death. After one parcel had thus been purchased and conveyed the wife executed a will in accordance with the agreement. Afterwards another parcel was purchased and conveyed to the wife in the same manner, and the wife died without making any further will, both parties, as the bill alleged, supposing it would embrace the after-acquired property also; but in the then state of the law here it descended to her daughter as in intestacy. Upon the application of the husband the equity court, upon the proofs in the case, held he was entitled to a decree that the heir-at-law should be held to be a trustee for the father. This decree was approved in 20 D. C. Rep., 330, Sherman *v.* Sherman.

63

The decision of Chancellor Kent, 2 Johnson's Chancery Rep., 537,

in Livingston *v.* Livingston, cited by the court in the Sherman case, is to the same effect.

It is impossible to read the testimony in this cause without becoming convinced that the contentions of the complainants' bill truly represent the case.

It is evident that Mr. Avery, the husband, had for many years been warmly devoted to the cause of scientific research and had become infatuated with the desire of dedicating whatever property he possessed to those purposes, under the protection of the Smithsonian Institution.

It is equally well established that his wife entirely sympathized with the husband in these wishes and purposes, and no change on the part of either in these positive intentions is disclosed anywhere in the testimony.

His earliest manifestation of these purposes shown in the record appears in his will made 13th September, 1882, by which, after leaving a life estate in his property to his wife, with injunctions to "keep it in good order for its final disposition," he devises and bequeaths it all on her death to the authorities of the Smithsonian Institution, who were to take charge of it and from it create a fund, to be called "the Avery fund" or "the fund contributed by Robert S. Avery and his wife, Lydia T. Avery, for the extension of the sciences," and all publications made with this fund must have a note thereon stating that they have been thus published.

This will, though revoked by the later wills, is evidence of the declared purposes and desires of both husband and wife three years before the purchase of the A Street property.

Its declarations are in entire accord with the testimony of Mr. Shidy, a witness to each of the testamentary papers of Mr. Avery, who was the most intimate friend of both parties from 1873 up to the death of Mr. Avery and was his associate in the Coast Survey Bureau and repeatedly the inmate of their house for weeks together. He heard and took part in the conversations between them as to the plan of purchase of the property on A street and as to the form in which the deed should be made out, and testifies that when the husband yielded to the request of the wife that the property should be conveyed to her it was upon the avowed agreement that it was to be enjoyed by her only as tenant for her life, and only if she should survive her husband, and should be received by the Smithsonian Institution immediately upon the death of the survivor for the scientific objects that both so earnestly desired to foster. Shidy further says that subsequently to the deed both of them fre-
64 quently alluded to the property as being held upon the same understanding, that it was to be hers during her life only if she survived her husband and was to be disposed of at her death, in accordance with the will of Avery, with the rest of his property; that the reasons given for this arrangement were that "the property had been paid for with his money, and that he was anxious the fund should be as large as possible, and he did not contemplate it should be diminished by the amount he should invest in the house;" that Mrs. Avery spoke on various occasions of her purpose

to carry out this agreement and invariably said she hoped to make a will before she became incompetent to do so; that some of these conversations took place before the purchase and some of them subsequently, from that time up to as late as within two weeks of her death.

Mr. Bumpus, the tenant of the A Street house for five years from 1887, testifies the husband executed the lease as lessor in his own name, and always received the rents himself and gave the receipts in his own name; that Mrs. Avery repeatedly told the witness Mr. Avery proposed to leave everything they had at their death to the Smithsonian to establish an Avery fund in the interest of science, and "that the survivor of them was to carry out the wishes of the two."

The declarations of Mr. Avery before the execution of the deed of 1885 and about that time and the declarations of Mrs. Avery at any time before her death are admissable as showing that the *intention* of the parties when the deed was given was that the beneficial interest in the property was not to be placed in the wife. The husband's execution of the lease describing the property therein as belonging to him and his receipts in writing on each pay-day of the rents from the beginning of the tenancy up to his death, all executed with the knowledge and in the presence of the wife and with her approval, although not competent testimony in support of the resulting trust, would still be admissable as evidence of acquiescence on the part of the grantee in the truth of the husband's constant assertions in her presence, thus made by the receipts and by the execution of the lease, of the true intention of the parties when the purchase was made and the deed given.

In the same way the similar statements of the husband, shown by the witnesses to have been repeatedly made, after the execution of the deed, in the presence of the wife, would undoubtedly be competent to sustain the theory of complainants as to that intention. If the husband's statements of that transaction were not correct, it was her duty to have denied them; but, so far from doing so, she uniformally admitted their entire truth. It is impossible to believe she would ever have attempted to repudiate this agreement if she had survived the husband without ascribing to her a moral delinquency inconsistent with her other conduct in the transaction and her respect and affection for her husband. It cannot be doubted that if Mr. Avery had entertained the slightest doubt his wife would not carry out fully their cherished plan he never would have allowed the lot to be conveyed to her, or if such doubts had arisen
65 after the execution of the deed that he would promptly have taken measures to enforce the performance of her pledges. To retain the title and repudiate this promise, under force of which it was obtained, would have been a fraud that equity would not have tolerated.

I have not taken into account the testimony of Mr. Cox, who it was shown was consulted as an attorney by both husband and wife about the execution by the wife of a will leaving the lot to the

Smithsonian Institution, although the better authorities would seem to justify its admission.

38 New Jersey Equity, 402, Gulick *v.* Gulick.
70 New York, 60, Hebbard *v.* Hanghian.
14 B. Mon., 417, Rice *vs.* Rice.
1 Greenleaf, Evidence, sec. 239, note A.
To the contrary is Scranton *v.* Stewart, 52 Ind., 68.

The letter of Mrs. Avery of 26th of October, 1885, to Mr. Hazleton, who prepared the deed (six months after its date) with reference to the settlement of some small balances of rent and taxes due on the house by Sands, the grantor, clearly supports the view that she pretended to no independent claim to the lot. In the few lines of the note she speaks six times of the matter in hand as being of importance *to herself and her husband*, describing both as "we" and "us."

Not a word of evidence in contradiction of the phintiff's contention is offered on the part of the defendants.

As the wife, if living, upon the proofs here would be compelled by chancery to execute all needful conveyances to confirm the title to the institution, so the defendants, who claim as her heirs-at-law, have their consciences affected by the proofs and should be made to comply with the duty that devolved upon their intestate.

In 24 Beavan, 679, The Queen *v.* Chapel of St. George, it was held that a resulting trust arises in favor of the grantor where lands were conveyed on charitable trusts to be afterwards declared and no subsequent declaration of the trust is made.

It would be extraordinary, indeed, that the Smithsonian Institution should be obliged out of the benefactions of the husband to create a fund to be called "the fund contributed by Robert S. Avery *and his wife, Lydia T. Avery,*" if her heirs should continue their efforts to frustate the meritorious objects they both had so much at heart.

The objection that the purpose pointed out by the testator is chimerical in the opinion of the heirs is nothing to the purpose. The possibilities of scientific research are very great, but, however illusory the designs of the testator may appear to be, in the present instance the will expressly provides that he does not *require* the Smithsonian Institution to apply the property in the manner suggested, but leaves to its authorities the selection of the character of scientific researches to which the gifts may be applied.

Upon the entire case I am satisfied the prayer of the bill should be granted, and that a decree should be passed declaring that upon the death of Robert S. Avery the full title to the A Street lot
66 became vested in the complainant for the purpose indicated in the bill.

Second. By item six of the bill of 1893 the testator provided: "I bequeath to the sister and brothers of my late wife one thousand dollars (1,000), to be equally divided between them. I have already given these last over a thousand dollars which my wife inherited from her father, also clothing and other gifts, thus equalizing sub-

stantially my gifts to her family and to mine. These bequests are all made upon the condition that the legatees acquiesce in the will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named."

It is insisted the condition attached to this legacy is powerless to effect a forfeiture, notwithstanding the present position of the legatees in resisting the devise of the A Street lot to the complainant.

In my opinion, the provision is not of the character that is held by the courts to be regarded as merely *in terrorem*, but is valid in law, and is such an one as the testator had a right to impose, and it may well be enforced.

2 Redfield on Wills (298).

But the indisposition of the courts of equity to enforce forfeitures might operate to prevent a decree for its operation against the defendants under conditions that might arise in this cause.

The conduct of the defendants in this respect has a wider effect than the mere forfeiture of the legacy. Their acts set in operation the law governing the principle of *election* which must apply to every person whom a will proposes in any particular to benefit.

2 Redfield (352).

The defendants, with full knowledge of all the facts, are claiming the legacy of $1,000 given them by the will as free from all conditions, while they dispute the devise of the A Street lot, made by the same instrument to the complainant. This is at variance with the established rule that one cannot be allowed to claim under a will and against it. The operation of this rule is extensively considered in McElfresh *v.* Schley, 2 Gill, 200, where the court adopted the principle as applicable to that case to its full extent. In the words of the court, "it is only carrying out a plain intent of the testator and giving to the residuary legatee that which the testator intended, and forbidding the heir from taking property not designed for him. From the earliest case on the subject the rule is that a man shall not take a benefit under a will and at the same time defeat the provisions of the instrument. If he claims an interest under an instrument he must give full effect to it, so far as he is able to do so. He cannot take what is devised to him, and at the same time what is devised to another, although but for the will it would be his; hence he is driven to his election to say which he will take."

None of the exceptions to the application of the rule apply to the present case.

67 In 2 Redfield, chapter 2, sec. 41 (370), the author, quoting from a recent California case, says: "Although the testator had no legal power to dispose of the property of another, yet, if he assumes to do so by his will and such person accepts a devise or bequest under the will, it will be a confirmation of such disposition of his own property by the testator."

24 Ohio N. S., 11, Huston *v.* Cone.

17 Pickering, 308, Hyde *v.* Baldwin.

If the defendants shall now relinquish their opposition to the devise to the complainants of the lot on A street, the court would decline to enforce the forfeiture of the $1,000 legacy, notwithstanding their opposition heretofore to the devise in question, but not otherwise.

I will sign a decree founded upon the principles of this opinion.

A. B. HAGNER,
Asso. Justice.

January 25, '96.

SMITHSONIAN *vs.* MEECH. } No. 16496.

Hackett.
Franklin H. Mackey.

The clerk will enter an appeal for all the defendants except Julia N. Avery from the decree entered herein on the 27th of January, A. D. 1896, to the Court of Appeals of the District of Columbia and issue citation to the plaintiff (appellee.)

FRANKLIN H. MACKEY.

Appeal as ordered entered.

BY CL'K.

'96, 2, 7.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION *vs.* LEVI W. MEECH, STEPHEN T. MEECH, W. W. Meech, Lucy M. Lord, and Julia N. Avery, Executrix of the Estate of Robert Stanton Avery, Deceased, *et al.* } No. 16196. In Equity.

The President of the United States to the Smithsonian Institution, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia on the 7th day of February, 1896, wherein Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech,
68 W. W. Meech, and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 7th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 10th day of February, 189–.

FRANK W. HACKETT,
Attorney for Appellee.

Stipulation of Counsel.

Filed February 10, 1896.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION
vs.
LEVI W. MEECH *et al.*
} In Equity. No. 16496.

It is hereby, this 10th day of February, A. D. 1896, stipulated and agreed by and between the parties to this cause that in lieu of the bond heretofore directed to be given by the appellants they may deposit the sum of one hundred dollars in the registry of the court, which said one hundred dollars shall take the place of said bond, subject to the right of appellee to require for cause that the same be increased.

THE SMITHSONIAN INSTITUTION,
By FRANK W. HACKETT.
LEVI W. MEECH ET AL.,
By FRANKLIN H. MACKEY.

MEMORANDUM.—1896, February 10, $100 deposited by the defendants in lieu of bond for appeal.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia,
} ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 124, inclusive, to be true copies of originals in cause No. 61496, in equity, wherein The Smithsonian Institution is complainan- and Levi W. Meech, Stephen T. Meech, W. W. Meech, Lucy M.
69 Lord, and Julia N. Avery executrix, are defendants, as the same remain upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 18th day of February, A. D. 1896.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 558. Levi W. Meech *et al.*, appellants, *vs.* The Smithsonian Institution. Court of Appeals, District of Columbia. Filed Mar. 12, 1896. Robert Willett, clerk.

70 WEDNESDAY, *April 22d, A. D.* 1896.

LEVI W. MEECH and SUSAN MARIA MEECH, His Wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, His Wife; Lucy M. Lord and James Leander Lord, Her Husband, Appellants,
vs.
THE SMITHSONIAN INSTITUTION. } No. 558.

The argument in the above-entitled cause was commenced by Mr. F. H. Mackey, attorney for the appellants, and was continued by Mr. F. W. Hackett, attorney for the appellee, and was concluded by Mr. F. H. Mackey, attorney for the appellants.

71 LEVI W. MEECH and SUSAN MARIA MEECH, His Wife; Stephen T. Meech, W. W. Meech and Jaennette Meech, His Wife; Lucy M. Lord and James Leander Lord, Her Husband, Appellants,
vs.
THE SMITHSONIAN INSTITUTION. } No. 558.

Opinion of Court.

Mr. Justice MORRIS delivered the opinion of the court:

This is a suit in equity filed by the appellee, The Smithsonian Institution, to establish its title to certain real estate in the city of Washington, against the claims of the appellants.

One Lydia Tyler Avery, wife of Robert Stanton Avery, died in the city of Washington, where both had resided for many years, on November 18, 1890, leaving her husband surviving her. She died intestate and possessed of a fee-simple estate in a part of lot No. 2, square 787, in the city of Washington, to which the appellants who are her nearest relatives now claim to be entitled, as her heirs-at-law.

Robert Stanton Avery, the husband, who was about twenty years older than his wife, survived her nearly four years, dying on September 12, 1894, in the eighty-seventh year of his age. He left a will executed on July 22, 1893, whereby, among other bequests, he left $1,000 to be equally divided between the sister and brothers of his late wife, the appellants in this case, upon the condition that the legatees should "acquiesce in this will," and providing that the share or shares of any disputing this will should go to the residuary legatee thereinafter named. The residuary legatee and devisee purported to be the "Smithsonian Institution," the appellee in this case; and the clause of the will purporting to devise and bequeath the residue of the estate was as follows:

"All the rest and residue of my estate, of whatsoever nature, real, personal, or mixed, and wheresoever situate, I hereby give, devise and bequeath unto the Smithsonian Institution, a body corporate by virtue of the laws of the United States, of which institution Samuel P. Langley is now secretary, having its legal residence in the District of Columbia, unto it and its successors forever."

Thereafter in the will the testator proceeded to give as his reason for so disposing of his property his great love for science and his desire for the diffusion of knowledge, for which he had long been toiling in humble capacities, in which he stated that he had acquired most of his property; and he expressed his desire that the fund derived from the residuary bequest should be known as "the Avery fund," or "the fund contributed by Robert S. Avery and his wife Lydia T. Avery for the extension of the sciences." He indicated also the special mode in which he preferred that the fund should be used. He then proceeded to make the following statement:

"The property known as part of lot 2 (two), in square 787, in the city of Washington, D. C., being premises No. 326 A St. S. E., is my property although the title stands in my wife's name. I include it in the residuary bequest to the Smithsonian Institution."

It is over the ownership of this lot of ground so described that the present controversy has arisen, the appellants, as already stated, claiming to be entitled to the property as the heirs-at-law of Lydia T. Avery, the wife, who died seized and possessed of it; and the appellee claiming it as the residuary devisee under the will of the husband Robert S. Avery by virtue of a resulting trust.

Robert S. Avery was for many years in the service of the United States as an employee of the Coast Survey Bureau. He was frugal, lived a retired life, and devoted himself to scientific research. He and his wife had no children; and it would seem to have been for several years a favorite scheme with him and the purpose of both that their property after their death, and the death of the survivor of them, should be devoted to the promotion and diffusion of scientific knowledge. It is claimed that there was an understanding between the two that for this purpose the property should be left to the Smithsonian Institution by wills to be executed by each of them, reserving a life estate to the survivor. But, as already stated, Mrs. Avery died intestate, and without making any testamentary or other disposition whatever of her property, which is that in controversy here. Mr. Avery, more than two years after the death of his wife, made the will that has been mentioned.

In the year 1882, during the lifetime of his wife, and when it was the confident expectation of both that, in consequence of his greater age and infirmity, she would survive him, he had made
72 another will, by which he had devised and bequeathed all his estate to her for life, and upon her death to the Smithsonian Institution for the same cherished purposes as in his later will. There was no mention in this will of any specific property; nor had the property in controversy here been at that time purchased. That purchase was made in 1885; and the deed of conveyance of it by the vendor to Mrs. Avery was the ordinary form of deed of conveyance in fee-simple.

About two years after the death of Mrs. Avery, in November, 1892, Mr. Avery made an affidavit, which has been incorporated into the record before us, and by which he sought to affect the title to the property in controversy. In this affidavit, he states that "at

the time of the purchase he was not in good health, and his wife, Lydia Tyler Avery, being of the opinion that she would outlive him he permitted said property to be transferred to her upon the then expressed condition that she was to make a will in his favor in the event of his surviving her, as he had already done in her favor in the event of her surviving him, the mutual understanding being that the combined property was to be left to the survivor during life and then to be disposed of by will for scientific or educational purposes, as had been talked over and agreed upon by them in conversations between them, this disposition of all their estate being so made in consequence of their married life not having been blessed with children." And he went on further to state "that the entire consideration money paid over for said property was saved exclusively from his earnings; that his wife, Lydia Tyler Avery, departed this life on the eighteenth day of November, A. D. 1890, without issue and without a will, although he, at her request, during her last illness had prepared one embodying her wishes as herein expressed, but at the time of presenting it to her for execution she was too far gone to execute the same, and never thereafter rallied sufficiently to perform any such act."

Four or five other persons were also at the same time or thereabouts induced to make affidavits in support of the statements contained in Mr. Avery's affidavit; and one of these is given in the record.

Shortly afterwards, under date of December 20, 1892, Mr. Avery executed a codicil to his will of September 30, 1882, in which he repeated the substance of his affidavit; and under date of May 19, 1893, he executed another codicil to it, not important to be here recited. Subsequently, this will and the codicils to it were superseded by the will of July 22, 1893, which is the will that has been admitted to probate.

After the death of Mr. Avery, the appellee, The Smithsonian Institution, took possession of the property in controversy, and still continues in the possession of it. On May 15, 1895, it caused a paper to be recorded among the land records of the District of Columbia, purporting to be a declaration of ownership of the property, and to which was annexed the affidavit of Mr. Avery heretofore referred to, which was also transcribed among the records. On May 23, 1895, the appellants, claiming the property as heirs-at-law of Mrs. Avery, made formal demand upon the appellee for the possession of it, which demand was refused. Thereupon, on June 4, 1895, The Smithsonian Institution, as complainant, instituted in the supreme court of the District of Columbia the present proceedings in equity, in which it stated most of the substantial facts here enumerated, together with some other circumstances claimed to show the ownership of the property in controversy by Robert S. Avery, and by which it was sought, 1st, To have the equitable title to that property decreed to be in the complainant; 2d. To have the defendants enjoined from claiming title thereto, and to require them to execute deeds of conveyance thereof to the complainant; 3d. To require the executrix of the will of Avery to treat the legacy of $1,000 to

the appellants as forfeited to the appellee on the ground that they were disputing the testator's will; and, 4th. To have general relief.

Testimony was taken on behalf of the complainant, much of it under objection, which seems to a great extent to have been very properly interposed. The strongest part of this testimony for the complainant is that of one Leland P. Shidy, an associate of Avery in the Coast Survey office, and an intimate friend and frequent guest of Mr. and Mrs. Avery. He makes this statement:

"I was at their house at the time when they began talking about making the purchase, and they discussed it, in the first place, as to the advisability of getting the property at all; and after that was decided, they discussed as to how the deed had better be made out, and Mrs. Avery thought it would be best to put the deed in her name, although her husband's money was paying for it exclusively, and he thought best to do so, and had the deed made out in her name."

"She wanted it in her name, in the first place, because she wanted to have the control of that property, as it was immediately contiguous to her own home, and then she thought she would be pretty certain to outlive her husband, and that it would be better in case of his death to have the title in her name than in his name."

"It was agreed that she should have the property during her lifetime, and that she should make a will transferring it at her death to the Smithsonian Institution."

There was no writing whatever of any kind produced signed by Mrs. Avery that had reference to the property, except a letter or memorandum, apparently addressed by her to her attorney, or the attorney who had prepared the deed to her, in which she uses the expression "*we*" and "us" in connection with the papers and some small payments that remained to be adjusted. The paper proves nothing, certainly nothing in favor of the complainant.

The defendants took no testimony, beyond offering in evidence two bank accounts of Mrs. Avery, both with the same banking institution in Norwich, Connecticut, from which place she seems to have come, and each of them, it would seem, a distinct account—one showing a balance of $696 to her credit on July 1, 1861, and the other showing a balance of $997.39 to her credit on July 1, 1890.

Upon the hearing, the supreme court of the District of Columbia rendered a decree in favor of the complainant, The Smith-
73 sonian Institution, to the full extent claimed; and the learned justice who sat in the case filed a very able and elaborate opinion, which is found in the transcript before us, in support of the conclusion reached by him. From that decree the defendants have prosecuted the present appeal.

We think that there can be no doubt whatever of the purpose of the deceased Robert S. Avery to devise to the Smithsonian Institution for the promotion of scientific education, not only such property as he may have had in his own name and under his direct control, but likewise, so far as he might control it, the property standing in his wife's name and in controversy in this suit. And we think, also, that it is highly probable that Mrs. Avery sympathized

in her husband's enthusiasm for science, and had similar purposes in reference to her own property, or the property here shown to have been placed under her exclusive control. But it is very plain that, whatever may have been her purpose in that regard, she failed to carry it into effect. Whether she afterwards changed her mind, or whether she for some reason postponed the execution of her will, the fact remains that she made no testamentary disposition of this property, in accordance with what would seem to have been the wishes of her husband, and what is claimed to have been the understanding or agreement between them. It is plain that, if there was any agreement or understanding of that kind between the two, it was, as set forth in the affidavit of Avery and the testimony of Shidy, that she was to retain this property for her life, and that she was to make a will, devising it upon her death to the Smithsonian Institution for the scientific purposes specified. This is the only understanding sought to be shown to have existed between them.

Now, it requires no elaboration of argument or citation of authorities to show that this understanding or agreement, even if proved beyond any possible doubt, could not be enforced by a court of equity against the objection of the holders of a legal title and the plea of the statute of frauds, in the absence of any memorandum in writing by which it could properly be evidenced. Such an agreement would simply raise an express trust, which would be null and void and incapable of being enforced under the statute of frauds. The trust was that Mrs. Avery should make a certain will; she has made no will of any kind; and there is no power in the courts to make a will for her.

But this is conceded by the appellee, although both the bill of complaint and the testimony are largely devoted to the establishment of this express trust. The effort is to show that, notwithstanding this proof of an express trust, the money for the purchase of the property in question was paid exclusively by Mr. Avery from his own earnings, and that therefore there was a resulting trust in his favor.

A resulting trust arises by operation of law, when one person buys an estate and pays the purchase-money therefor, but takes the deed in the name of another person. The person, in whose name the deed is taken, becomes a trustee for the person who has paid the money; and the trust so created is exempted from the operation of the statute of frauds by the express provision of that statute itself. But it is well-settled law that this does not apply to the case where the deed is taken in the name of a person, such as a wife or a child, for whom the person who pays the purchase-money is under any obligation, legal or moral, to provide. In this case no presumption of a resulting trust arises; and it is incumbent on the person who claims the existence of such a trust to show it by clear, positive, and unequivocal proof.

This reduction, which may be regarded as elementary law, we do not understand to be controverted in this case; and accordingly the appellee, for whose benefit the resulting trust is now claimed, has undertaken the burden of showing its existence, as it was bound to

do by positive proof to that effect. But we fail to be convinced that it has succeeded in the effort.

The proof in such case, it has been said, must be clear, positive and unequivocal. It must leave nothing to doubtful inference, or to deductions from loose and casual conversations or ambiguous circumstances. The right to property is too sacred to be made dependent upon the doubtful recollection of casual conversation sought to be reproduced long after their occurrence and when the parties to them have passed away, and explanation by those most competent to explain is no longer possible. This is the rule laid down by all the authorities; and we are compelled to hold that, tested by this rule, the testimony of the appellee, on whom the burden of proof was imposed, wholly fails in our opinion to establish a case of resulting trust.

The testimony of all the witnesses for the appellee, except one, simply tends to prove that it was the money of Robert S. Avery, and not that of his wife, that was paid for the property in question. But we assume this to have been the fact, although we do not by any means regard it as satisfactorily proved. As already stated, conclusive proof of it would not establish a resulting trust as between husband and wife. There must be something further than that, some satisfactory evidence to rebut the presumption of a gift or advancement by the husband to the wife. The only other evidence in that regard, excepting that of the one witness to whom we have referred, is to the effect that the property was sometimes mentioned by Mrs. Avery as their joint property, and that Mr. Avery once or oftener executed a lease of the property in his own name and collected the rents. But it is not unusual for the merest agents to rent property in their names which has been placed in their hands for management, and to collect the rents; and most assuredly no just inference of joint ownership, certainly no reasonable inference of real ownership in her husband antagonistic to her own can be drawn from occasional expressions used by Mrs. Avery, such as "we," "us," "our," "our property." For such expressions there is a greatly more reasonable and more obvious explanation. On the other hand, the testimony of several of these witnesses goes to show that Mrs. Avery claimed the property as her own, and that she desired to have the title in herself in order that she might control it. And such control, of course, would be inconsistent with any theory of a resulting trust in her husband.

74 Only one witness, Mr. Leland P. Shidy—whose opportunities for knowledge, it is true, seem to have been exceedingly favorable—testifies to any agreement or understanding between the husband and wife with regard to this property, or to any circumstances that might be supposed to tend to rebut the presumption of a gift or advancement by the husband to the wife. For, of course, we cannot regard as testimony the affidavit of Robert S. Avery made after the death of his wife, and to which we have already referred as stating most strongly the contention on which the appellee relies. But the testimony of Shidy, even if we assume that his testimony alone could overcome the sworn answer of the defendants in

the case, wholly fails to establish a case of resulting trust. The portion of this testimony which is strongest for the appellee has already been cited; and it simply shows that Mrs. Avery took the title to the property because she wished to control it, and with the understanding that she should hold the property during her lifetime, and make a will transferring it at her death to the Smithsonian Institution.

This testimony is corroborated by that of Mr. John F. Cox, if his testimony is admissible, a point which we need not decide here. He seems to have been called in professionally by Mr. Avery to make his will for him, and also a will for Mrs. Avery. He states that Mrs. Avery "said that her husband had permitted her to take the property in her own name, and that she wished to make a will that would follow out his intentions as to his own property." And he adds that the reason why he did not draw a will for her was that she would postpone it until after Mr. Avery's will; that she could make hers afterwards; and that she knew that he was going to die before she would, since he was so very ill.

Now, all this shows very clearly that Mrs. Avery regarded the property as her own, to be controlled exclusively by herself, but intending to devise it at her death to the Smithsonian Institution. Not even a life estate was contemplated to be reserved to her husband in the event of his survival of her, for that event seems to have been considered highly improbable by both of them in view of Mr. Avery's greater years and feebler health, although it was that event which actually occurred. So, instead of being proof of a resulting trust in favor of Robert S. Avery, the testimony shows conclusively that no such trust was intended or contemplated by the parties. If the transaction can be construed as creating any trust whatever, and it is not at all clear that it does create a trust of any kind, the trust is a conventional one, inconsistent with any theory of a resulting trust. There may be cases where, upon the failure of an express agreement, parties may fall back upon a resulting trust; but that can only be where the resulting trust exists independently of the express agreement and is not inconsistent with it. The failure of an express trust or of a specific agreement in regard to real estate to prove effective does not authorize parties by that failure alone to fall back upon a resulting trust when none was intended in the transaction.

We have no desire to dissent from the statement of the law by the learned justice who heard this case in the court below, as contained in his very able and elaborate opinion which we find in the record; but we fail to find in the record the testimony which in our opinion is required to support it.

With reference to the legacy of $1,000 given to the appellants by the testator Robert S. Avery, and which is sought to be forfeited in this proceeding on account of the alleged disputing of the will by the appellants, it is not seriously controverted by the appellee that the decree of the court below in that regard must be modified. Forfeiture is not greatly favored in equity under any circumstances; and this case is not one for the enforcement of a forfeiture. It may

be suspected that the claim of the appellants to the property in dispute was the very thing against which the testator was solicitous to guard; but clearer and more unequivocal language for that purpose should have been used to justify a court of equity in decreeing a forfeiture in this case. Claiming property which it is contended did not pass under the will, and which we here hold did not pass under the will, cannot in any proper legal sense be regarded as a disputing of the will.

We are of opinion that the decree of the supreme court of the District of Columbia in this case is erroneous, and that it should be reversed, with costs; and that the cause should be remanded to that court, with directions to vacate that decree, and to dismiss the bill of complaint. And it is so ordered.

75 TUESDAY, *May 12th, A. D.* 1896.

LEVI W. MEECH and SUSAN MARIA MEECH, His Wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, His Wife; Lucy M. Lord and James Leander Lord, Her Husband, Appellants,

vs.

THE SMITHSONIAN INSTITUTION.

No. 558. April Term, 1896.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said supreme court with directions to vacate that decree and to dismiss the bill of complaint.

Per MR. JUSTICE MORRIS.

May 12, 1896.

76 WEDNESDAY, *May 20th, A. D.* 1896.

LEVI W. MEECH and SUSAN MARIA MEECH, His Wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, His Wife; Lucy M. Lord and James Leander Lord, Her Husband, Appellants,

vs.

THE SMITHSONIAN INSTITUTION.

No. 558.

On motion of Mr. F. W. Hackett, attorney for the appellee in the above-entitled cause, it is ordered by the court that said appellee be allowed an appeal to the Supreme Court of the United States.

77 Court of Appeals, District of Columbia.

LEVI W. MEECH *et al.*, App'ts,
vs.
THE SMITHSONIAN INSTITUTION. } No. 558.

Stipulation.

It is agreed between the parties that the value of the property involved in this suit was at the date of taking the appeal greater than five thousand dollars ($5,000), exclusive of interest and costs. It is further stipulated that this agreement be made a part of the record on appeal to the Supreme Court of the United States.

THE SMITHSONIAN INSTITUTION,
By FRANK W. HACKETT, *Att'y.*
LEVI W. MEECH ET AL.,
By FRANKLIN H. MACKEY.

Endorsed: Court of Appeals, D. C., April term, 1896. No. 558. Levi W. Meech *et al.*, appellants, *vs.* The Smithsonian Institution. Stipulation of counsel as to value of property. Court of Appeals. District of Columbia. Filed May 22, 1896. Robert Willett, clerk.

78 MONDAY, *June 1st, A. D.* 1896.

LEVI W. MEECH and SUSAN MARIA MEECH, His Wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, His Wife; Lucy M. Lord and James Leander Lord, Her Husband, Appellants,
vs.
THE SMITHSONIAN INSTITUTION. } No. 558.

Upon motion of Mr. F. W. Hackett, attorney for the appellee in the above-entitled cause, the bond on appeal to the Supreme Court of the United States is fixed at the sum of four hundred dollars.

79 Know all men by these presents that we, The Smithsonian Institution, as principal, and John B. Henderson, as surety, are held and firmly bound unto Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, in the full and just sum of four hundred dollars, to be paid to the said Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a Court of Appeals of the District of Columbia,

in a suit depending in said court between Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, appellants, and The Smithsonian Institution, appellee, a decree was rendered against the said Smithsonian Institution, and the said Smithsonian Institution having appealed from said decree and obtained a citation directed to the said Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that is the said Smithsonian Institution shall prosecute its appeal to effect and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

THE SMITHSONIAN INSTITUTION, [SEAL.]
By G. BROWN GOODE, *Acting Secret'y.* [SEAL.]

[Seal of the Smithsonian Institution.]

JOHN B. HENDERSON. [SEAL.]

Approved by—

R. H. ALVEY, *Ch. Justice.*

[Endorsed:] No. 558. Levi W. Meech *et al.*, appellants, *vs.* The Smithsonian Institution. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed June 1, 1896. Robert Willett, clerk.

80 UNITED STATES OF AMERICA, *ss:*

To Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Smithsonian Institution is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 1st day of June,

in the year of our Lord one thousand eight hundred and ninety-six.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.

LEVI W. MEECH,
By FRANKLIN H. MACKEY,
His Solicitor.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun 1, 1896. Robert Willett, clerk.

81 Know all men by these presents that we, The Smithsonian Institution, as principal, and John F. Rodgers, as surety, are held and firmly bound unto Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaenette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, in the full and just sum of five thousand dollars, to be paid to the said Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaenette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, and their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this thirteenth day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between the said Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaenette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, appellants, and The Smithsonian Institution, appellee, a judgment was rendered against the said Smithsonian Institution, and the said Smithsonian Institution having duly taken an appeal, as appears of record in the clerk's office of the said court, to reverse the said judgment, and a citation was duly issued, directed to the said Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaenette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, citing and admonishing them to be and appear at a Supreme Court
82 of the United States, to be holden at Washington, within 30 days from the date thereof, which citation was duly served; and whereas the said Smithsonian Institution has already furnished security for the costs of said appeal and desires to furnish further security as a supersedeas:

Now, the condition of the above obligation is such that if the said Smithsonian Institution shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then

the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—
THE SMITHSONIAN INSTITUTION,
[Seal of Smithsonian Institution.]
By G. BROWN GOODE,
Acting Secretary. [SEAL.]

JOHN F. RODGERS. [SEAL.]

Witness:
J. LOUIS WILLIGE.
LEONARD DAMMANN.

Approved by—
DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.

June 13th, 1896.

(Endorsed:) No. 558. Levi W. Meech *et al. vs.* The Smithsonian Institution. Supersedeas bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 15, 1896. Robert Willett, clerk.

83 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 82, inclusive, contain a true copy of the transcript of the record and proceedings of said Court of Appeals in the case of Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, appellants, *vs.* The Smithsonian Institution, No. 558, April term, 1896, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 18th day of June, A. D. 1896.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,323. District of Columbia Court of Appeals. Term No., 191. The Smithsonian Institution, appellant, *vs.* Levi W. Meech *et al.* Filed June 19, 1896.

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE SMITHSONIAN INSTITUTION, *Appellant*,
vs.
LEVI W. MEECH, *et al.*, *Appellees.*
} No. 191.

APPELLANT'S BRIEF.

The appellant is devisee under the will of Robert S. Avery, who died at Washington, D. C., 12th September, 1894, leaving all his property, real and personal (after payment of a few legacies), to the Smithsonian Institution, in trust for the furtherance of certain scientific researches. The testator names lot 2, in square 787, in the City of Washington, as included, which though standing in the name of his wife, he declares to be his property.

Mrs. Avery died 18th November, 1890, in a house upon Capitol Hill, where she and her husband had resided for many years. The appellees, three brothers and one sister, are her heirs-at-law.

Mr. Avery had bought this lot in 1885, with his own money, to please his wife, He directed that the deed should be made out in her name. This was done upon her agreement at the time to make a will, so that in the event of his surviving her the lot would be his, to go like the rest of his property to the Smithsonian Institution. It does not appear whether the will was to be made directly in his favor; or, the devise to be to him for life with remainder to the Institution.

Mrs. Avery postponed executing her will, though she frequently expressed an intention of making one, and talked with a lawyer about it. She died suddenly without having made a will. Before purchasing this lot Mr. Avery had executed his will, giving everything (except a few legacies), to his wife for life, and upon her death to the Smithsonian Institution. This fact Mrs. Avery knew at the time when, in view of the purchase of the lot in question, she agreed to make her will as above stated.

They had no children.

Upon Mr. Avery's death, the Smithsonian Institution filed a bill in equity reciting the circumstances of the purchase of the lot, and the agreement between husband and wife in relation thereto, and setting forth that defendants claimed the lot as heirs-at-law, and that they, with knowledge of the facts, had demanded possession. The bill sought a perpetual injunction against defendants. It asked that a legacy of $1,000 to defendants, given to them on condition that they acquiesce in the will, be declared forfeited.

The Supreme Court of the District of Columbia (HAGNER, J.) entered a decree in favor of the plaintiffs. Upon appeal, the Court of Appeals decided that the testimony failed to convince them that the parties intended a trust in favor of the husband; and they reversed the decree below. The Smithsonian Institution, 20th May, 1896, took an appeal to this court.

STATEMENT OF FACT.

Robert S. Avery for thirty-two years was employed in the Coast Survey, and latterly had held the responsible position of Chief of the Tidal Division. Here he devised new methods of observing the tides, and introduced an improved system of classifying the results so obtained.

Both Mr. Avery and his wife chose to live apart from society. Practising strict economy, and making almost no

acquaintances, this couple in their seclusion came to be something of a mystery to their neighbors. By some people they were looked upon as "peculiar and eccentric." (Rec., 27.)

The only person, it seems, whom they cared to admit to their intimacy was Mr. Shidy, a gentleman by many years their junior. Mr. Shidy entered the Coast Survey in 1873 at the age of twenty-two. Working under the eye of Mr. Avery he attracted the attention of his chief, who appears to have taken a liking to him. It resulted in Mr. Shidy's becoming a frequent visitor at the Avery house. Later he was rewarded with their whole confidence. He would frequently dine there, and when Mr. Avery's duties took him out of the city Mr. Shidy would stay at the house as a guest for even a month at a time.

Mr. Avery knew nothing of business. He contrived to save money, but he showed little wisdom in investing it. As they had no children they resolved that the property accumulated by Mr. Avery should be applied to the cause of science.

In the spring of 1885 Mr. Avery had some money to invest, and he consulted with his wife as to where to put it. At this time Mr. Avery was 77 years of age, his wife about 57. They took Mr. Shidy so far into their confidence as to discuss many times the subject, in its various bearings, in his presence (Rec., 41). They considered the advisability of buying the house and lot now in controversy, which (except for a vacant lot between) was next door easterly of the house in which they lived.

It appears that Mrs. Avery had been annoyed by former tenants of that house, and she thought if Mr. Avery were going to buy the lot the deed might well be put in her name, so she would control it. Besides, as Mr. Avery was advanced in years, and his health not of the best, it was almost certain that she would outlive him. It would be better, therefore, to have the title in her name, rather than in his name (Rec.,

41). For some reason she thought it would be pleasanter to have it in her name, and he was willing to please her (Rec., 46). They came to an understanding "that the property was to be her's during her lifetime, and was to be disposed of at her death in accordance with the will of Mr. Avery with the rest of his property" (Rec., 42). Mr. Shidy, who testifies as to these conversations, when asked why the property was to go to the Smithsonian, says:

"The reasons assigned seemed to be that the property was bought and paid for by Mr. Avery's money, and he was anxious that the fund he should leave for the benefit of science should be [as] large as possible so as to be as beneficial as possible for the purposes for which he left it, and he did not contemplate that it should be diminished by the amount of money invested in this property in any way." (Rec., 42.)

Mrs. Avery on various occasions spoke of making a will to carry out this agreement (Rec., 43).

Mr. Hazelton, who drew the deed, testified that Mr. and Mrs. Avery came to his office together. Mr. Avery paid the money and took the deed to put it on record (Rec., 21, 22). Six hundred dollars of the purchase money was retained to pay a note that a deed of trust on the land had secured. Later Mr. Avery paid this note (Rec., 37, 38).

The only writing to be found bearing on the transaction was a copy of what purported to be a note dated October 26, 1885, addressed to Mr. Hazelton, the grantor's attorney, which reads thus:

"*We* loaned $12.50 . . . please make it right to *us* . . . please send the papers, they are invaluable to *us*.

MRS. L. T. AVERY.

"Mrs. Avery wishes you would oblige *us* just now, if you can arrange with the bearer, Mr. R. S. Avery. Perhaps some time *we* may be of service to you. The money and papers are valuable to *us* just now. L. T. AVERY." (Rec., 44.)

(The italics are ours.)

Mr. and Mrs. Avery had consulted with Mr. John F. Cox, a member of the Washington bar, about their affairs. Both husband and wife talked freely with Mr. Cox, each in the other's presence, of the disposition to be made of their property after their respective deaths. Mr. Avery gave Mr. Cox a rather full history of the pieces of property he had acquired through the money he had earned in the Coast Survey. Of the lot in suit, he said (Mrs. Avery as usual being present,) that he had permitted Mrs. Avery to take it in her own name. Mrs. Avery said the same thing; that it was their intention at their death to let the survivor enjoy the property which Mr. Avery had, and she had during his or her life, and at his or her death it was to go to the Smithsonian Institute (Rec., 29). She regarded this property that she held only in trust, as it were (Rec., 29). She said that her husband had permitted her to take the property in her own name, and that she wished to make a will which would follow out his intentions as to his own property (Rec., 32).

Mrs. Avery appears (Rec., 32) to have put off making her will, thinking that she was sure to outlive her husband (Rec., 43). She died (1890) nearly four years before he died.

Upon her death, Mr. Avery employed Mr. Cox to draw up five affidavits of persons who knew the facts relating to the putting of the lot in the name of the wife (Rec., 30). It was intended to have these affidavits recorded in the Registry of Deeds, but it was found that they could not be admitted to record (Rec., 31). The affidavit of Mr. Avery himself will be found at page 31 of the Record. It was offered in evidence, not to prove the facts therein stated, but as tending to show that Mr. Avery upon the death of his wife claimed the property as his own.

The testator named his niece, Julia N. Avery, as executrix. He gave certain legacies to his relatives, and to relatives of his wife, equalizing the gifts substantially. "These bequests," he adds, "are all made upon the condition that

the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named" (Rec., 7).

In Mrs. Avery's lifetime her husband let the premises in question to a tenant for years in his own name. The tenant paid the rent to Mr. Avery in the presence of Mrs. Avery, and he invariably receipted for the payment in his own name, in her presence. This went on for five years (Rec., 25). To the tenant Mrs. Avery repeatedly said that the property was bought with Mr. Avery's money (Rec., 26). According to this witness (Col. Bumpus) Mrs. Avery repeatedly said, "that Mr. Avery and she proposed to leave whatever they had at their death to the Smithsonian Institute to establish an 'Avery Fund' in the interest of science, and that whichever one died first the other one was to carry out the wishes of the two, that everything they had was to be left to the Smithsonian Institute" (Rec., 26).

As already intimated, Mr. Avery had possession of the premises for four years after the death of his wife. Upon accepting the tract the Smithsonian Institution took possession, and it was not till 23d May, 1895, eight months after the death of Mr. Avery, that the heirs-at-law of Mrs. Avery demanded of the Institution a surrender of its possession. They do not deny that they had knowledge of the facts under which Mrs. Avery gained title; nor that they knew the contents of the affidavit of Mr. Avery, which the Institution caused to be put on record 15th May, 1895. (Rec., 5, 18.)

The complainants took testimony. The only evidence offered by defendants was a copy of a transcript from the books of a Savings Society in Norwich, Connecticut, showing a balance of $997.39 to the credit of Mrs. Avery (Lucy T. Meech), 1 July, 1890, the accumulations of a fund that exhibits no diminution in 1885, or immediately thereafter, when the lot in question was purchased.

The cause was heard on bill, answers and testimony, Julia N. Avery, executrix, having answered as a party defendant.

The Equity Court (HAGNER, J.,) allowed the prayers of the bill. The decree (Rec., 58, 59), declared the title to be vested in plaintiffs, enjoined the defendants, heirs-at-law of Mrs. Avery, from asserting title, and ordered them to execute a conveyance by way of quitclaim and release. It directed the executrix to treat the $1,000 bequest as having fallen into the residuum for breach of condition, unless defendants should within sixty days relinquish in writing their claim to the premises (Rec., 58, 59).

On the same day that the decree was entered (27 January, 1896), defendants took an appeal, thus refusing the privilege held out by the decree of averting a forfeiture of the legacy. Since they did not comply with the requirements of the decree within sixty days, the decree became absolute (Rec., 67).

The Court of Appeals reversed the decree, and remanded the cause with directions to dismiss the bill. From the opinion (MORRIS, J.), it appears that the Court were not satisfied that the parties at the time of the conveyance intended that a trust should exist (Rec., 71–75).

The Smithsonian Institution entered an appeal to this Court, 20 May, 1896.

SPECIFICATION OF ERRORS.

The decree of the Court of Appeals (Rec., 75), is erroneous, because:

1. It reverses the decree of the Supreme Court of the District of Columbia (Rec., 56–57).

2. It directs the Supreme Court of the District of Columbia to vacate its decree, and dismiss the bill.

a. The opinion of the Court shows the decree to be erroneous, because based upon the ground that:

i. It is not satisfactorily proved that the money paid for the property in question was the money of Robert S. Avery, the husband (Rec., 73).

ii. The testimony shows that no trust was intended or contemplated by the parties (Rec., 74).

iii. There was "no disputing of the will," and the legacy of $1,000 to the heirs of Mrs. Avery, has not been forfeited.

POINTS OF LAW.

I.

The defendants not having denied the fact of the express agreement between Mr. Avery and his wife, cannot take advantage of the statute of frauds, since they do not set up the statute in their answer.

Following the line of the opinion of Mr. Justice HAGNER, we did not seek to have that decision affirmed in the Court of Appeals by arguing that the trust was an express trust capable of being proved by parol. Our agreement was directed to satisfying the Court that a trust existed which by operation of law was excepted out of the statute, and therefore valid.

The appeal brings up the whole record of bill, answer and testimony, and entitles us to a rehearing, as of a trial *de novo*. We desire therefore to make a point, preliminary in its nature, to the consideration of the argument as presented by us below. (*Watts* v. *Waddle*, 6 Pet., 402.) We respectfully submit that the appellants are not entitled to rely on the statute of frauds. They did not plead it; nor have they denied the existence of the agreement between Mr. Avery and his wife upon the faith of which he parted with his money and purchased the land in question. This is apparent upon the record.

Our bill sets forth the fact of such an agreement as follows (Rec., 5):

"The plaintiffs aver the fact to be that at the time of the purchase of this property by Mr. Avery it was expressly agreed by and between himself and his wife that said premises were to be deeded to her, not to give her the fee-simple

title to the same, nor even to give her a life interest absolutely therein, but solely for the purpose of providing for her in the event of her husband dying before she should die, as that appeared almost certain would happen; and that Mrs. Avery was to make her will giving the same to her husband, so that the general purpose of his will should apply to this after-acquired real estate."

The defendants' answer does not traverse this allegation of fact. All that they plead, in response to our averment, is as follows (Rec., 17, 18):

"They have no personal knowledge of the fact, as alleged in the bill, that at or about the time of said purchase there was an understanding or agreement, verbal or otherwise, between the said Lydia and her said husband; that the said real estate was to be held by said Lydia in any other way than upon the terms expressed in the said deed of conveyance to her, and if said alleged fact be true and relevant they demand strict proof thereof."

This, it is needless to say, is not a denial. Nothing is here stated as to the defendants' belief. They only aver that they have no personal knowledge of the agreement. (*The Holladay Case*, 27 Fed. Rep., 841.) Under the code in Ohio, where a defendant answered that he cannot admit or deny the same, but demands proofs thereof, it was held that the answer was not a denial of the fact, and did not put plaintiff on his proof. *Building Association* v. *Clark*, 43 Ohio St., 427.

The defendants "demand strict proof." We do not contend that the doctrine of the Ohio case applies, and that by their form of pleading they admit our averment; but we do say that this is not such an affirmative plea as lets in the defence of the statute of frauds.

Although the subject is involved in much confusion, owing to contrariety of decisions, the general rule may be stated as this: A defendant must plead the statute of frauds if he would avail himself of its privileges.

The rule in equity in New York was early announced by WALWORTH, chancellor, and is frequently quoted as follows:

"If it is stated generally that an agreement or contract was made, the Court will presume it was a legal contract, until the contrary appears, and the defendant must either plead the fact that it was not in writing, or insist upon that defense in his answer." *Cozine* v. *Graham* (1830), 2 Paige, 181.

Chancellor BLAND (1827), thus states the rule in Maryland, as deduced from the English authorities:

"If a defendant makes his defense without expressly denying the whole contract, or in any other form, without relying upon the Statute of Frauds, he thereby tacitly waives its benefit, and cannot be permitted to take advantage of it afterwards or at the final hearing; so that if the contract should be sufficiently sustained by parol proof, the Court will grant relief, although written evidence of no part of such contract may have been produced." *Lingan* v. *Henderson*, 1 Bland., 248.

An exception, however, appears of late years to have been engrafted upon the rule in some jurisdictions. There are authorities which hold that where a defendant in his answer *denies the agreement*, he may avail himself of the statute, though he has not pleaded it.

The English Chancery decisions, would seem, however, not to sustain this exception. The latest edition of *Daniel's Chancery Practice*, Vol. 3, p. 2,117, note, says: "If a defendant does not insist by his answer upon the benefit of the statute of frauds, he cannot avail himself of its provisions at the hearing, although he denies the agreement set up by the bill," citing *Clifford* v. *Turrell*, 1 Y. & Coll., C. C., 138, and *Baskett* v. *Cafe*, 4 DeG. & S., 388. In the former case, counsel agreed at bar that such was the rule.

In *Skinner* v. *McDougal*, 2 DeG. & Sm., 265, the bill was

for specific performance. Defendant alleged that no formal note of agreement ever existed. But he did not expressly claim the benefit of the statute of frauds. *Held*, he was not entitled to benefit of the statute.

This Court has not authoritatively ruled upon the point, although it seems to have been brought under consideration briefly in the opinion of Mr. Justice BRADLEY, in *May* v. *Sloan*, 101 U. S., 231. That was a bill to compel a conveyance. The opinion finds that the alleged parol agreement to convey was not proved, and the decision is based upon the construction of another agreement, which was in writing. The court remarks that *if* the case depended upon the parol agreement, the statute of frauds would be a bar. "The defendant in his answer denies that any such agreement was made. Such a denial is as effective for letting in the defense as if the statute of frauds had been pleaded. *Sugden, Vendors and Purchasers*, 150, c. 4, sect. 6, par. 5." Page 237.

(The citation as printed in the report we have been unable to find in Sugden.)

In a subsequent case, Mr. Justice WOODS cites *May* v. *Sloan* as decisive of the point in question. *Dunphy* v. *Ryan*, 116 U. S., 496. But the report of the case does not show that the point was argued, or in any manner brought to the attention of the Court.

Even if we were to assume that the Supreme Court of the United States has given its deliberate sanction to a rule of practice that has not the weight of authority elsewhere to uphold it, we may observe that the rule itself goes no further than to give efficacy to a denial under oath by a defendant who is alleged to have been a party himself to the agreement. He is presumed to know what is the fact, and his denial makes it needful for the plaintiff to bring forward the testimony of two witnesses to overcome it. Such is not the character of the defendants' answer in the case at bar. They say they have no knowledge, and they do not state what is

their belief, as to the agreement. See language of Mr. Justice CLIFFORD in *Brown* v. *Peirce*, 7 Wall., 212.

If the rule is to be treated as established in the courts of the United States it must be justified, we submit, upon the ground that a denial under oath of a contract by one of the parties thereto is equivalent to an affirmative plea on his part that no such contract (capable of being enforced) ever existed. In other words, the denial may be regarded as practically setting up the statute. Such a rule does not benefit these appellants.

II.

The claim of the heirs-at-law of the wife to possession is against equity and good conscience. The husband bought the lot with his money; and both husband and wife intended that an equitable estate should remain in the husband, so that the lot should pass by his will to the Smithsonian Institution.

Before citing authorities, we wish to make it clear to the court that Mr. Avery paid for the land out of his own savings.

THE HUSBAND'S MONEY BOUGHT THE LAND.

The testimony on this point is positive and uncontradicted. But the opinion of the Court of Appeals, it seems, expresses a doubt:

"The testimony of all the witnesses for the appellee [The Smithsonian Institution,] except one, simply tends to prove that it was the money of Robert S. Avery, and not that of his wife, that was paid for the property in question. But we assume this to have been the fact, although we do not by any means regard it as satisfactorily proved." (Rec., 73.)

Let us therefore briefly review what the witnesses have testified to on the subject.

Mr. Hazelton, attorney for the grantor (Sands), says:

"Mr. Avery delivered the money on my table, and it was counted there, and they took the deed and went away." (Rec., 22.)

"*Cross-Ex.* I think you stated in your testimony-in-chief, that they took the deed and went away. Who do you mean by 'they?'

"A. I mean that the deed was given to Mr. Avery."

Lorenzo D. Bumpus, who was Colonel of the 57th Pennsylvania during the war, says:

"Mrs. Avery told me in my house and in her house and in his presence repeatedly that the property was bought with Mr. Avery's money." (Rec., 26.)

Col. Bumpus and his wife, it will be borne in mind, occupied the premises in controversy for five years or more (Rec., 25), as a tenant under a lease from Mr. Avery.

Mrs. Bumpus testifies:

"Q. Did she ever say anything to you about how the money was obtained with which that property was bought where you lived?

"A. Well, she used to say that it was Mr. Avery's money; that he had earned the money, and she claimed the property he had bought.

"Q. How did she say he had earned it?

"A. Well, I guess in the Coast Survey. I believe that is where he worked the greater part of the time.

"Q. I meant with reference to the size or amount of the money.

"A. I could not say how he got the money.

"Q. You say that she claimed the property. What was her language?

"A. She said that Mr. Avery had bought the property and told her she could have it, and she always said to me that it was her property." (Rec., 27.)

Mr. Brush testifies that Mr. Avery paid the $600 note that formed a part of the consideration money. (Rec., 37, 38.)

Mr. Shidy, who had a thorough acquaintance with the whole transaction, says, "Mrs. Avery" (he is speaking of a discussion in his presence just previous to the purchase) "thought it would be best to put the deed in her name, although her husband's money was paying for it exclusively." . . (Rec., 41.)

. . "The property was bought and paid for by Mr. Avery's money." . . (Rec., 42.)

This gentleman made an affidavit after the decease of Mrs. Avery.

On cross-examination as to the object of making an affidavit, he is asked:

"Q. He [Mr. Avery,] stated to you that he desired to establish the fact that it was his money that had purchased it, and his desires and his wife's desires in regard to the property?

"A. Yes; that it should go as the rest of the property goes." (Rec., 49.)

Mr. John F. Cox, a lawyer of Washington, who was consulted by Mr. and Mrs. Avery, and to whom in each other's presence they talked with the utmost freedom as to this piece of property, corroborates what Mr. Shidy says. Two or three times he speaks of Mrs. Avery, saying that her husband had "permitted" her to take the property in her name. He says distinctly:

"She always spoke about it as property which had been bought with the money that he had saved, and she always gave him great amount of praise for the economy which he had exercised in the early history of his life." (Rec., 29.)

We have good reason, therefore, to maintain, in the words of Mr. Justice HAGNER, that—

"It is satisfactorily proved in this case that the entire purchase-money for the A street property was derived by the husband from his own earnings, and in no degree from any property or funds of the wife." (Rec., 61.)

DID NOT INTEND TO MAKE A GIFT TO HIS WIFE.

1. Having proved that the husband paid the purchase money at the time he directed the deed to be made in the name of his wife; let us look at the evidence that Mr. Avery did not intend to make a gift of this lot to his wife.

Upon familiar principles a trust results between strangers upon payment of purchase money by one and placing title in another. In the instance of husband and wife, however, the presumption of an intention to benefit the real purchaser ceases, and the law takes the transaction to be meant as a gift or settlement.

The question is what was the *intent* that controlled the parties at the time the deed was delivered. The presumption that Mr. Avery intended a gift to his wife may be rebutted by parol proof. *Livingston* v. *Livingston*, 2 Johns. Ch., 537; *Sherman* v. *Sherman*, 20 D. C., 330.

Whether a purchase in the name of a wife is a settlement or not is a question of pure intention, though presumed in the first instance to be a provision and settlement; but any antecedent or contemporaneous acts or facts may be received either to rebut or support the presumption. *Persons* v. *Persons*, 25 N. J. Eq., 250, citing *Perry on Trusts*, §§ 147, 148; *Peer* v. *Peer*, 3 Stockt., 432; *Devoy* v. *Devoy*, 3 Jur. N. S., 79; *Stone* v. *Stone.*, *Id.*, 708; *Sidmouth* v. *Sidmouth*, 2 Beav., 447; *Christy* v. *Courtenay*, 13 Beav., 96; *Williams* v. *Williams*, 32 Beav., 370.

The nature of the proof required to establish a resulting trust in favor of a husband, is concisely stated in a carefully considered opinion recently announced by the Supreme Court of Rhode Island, as follows:

(1) That the husband paid the purchase money.

(2) That he *did not intend* the conveyance thereof to his wife to operate by way of advancement, there being a presumption that it was so intended when a husband pays for real estate and takes a deed to the wife. Per TILLINGHAST, J., *Hudson* v. *White*, 17 R. I., 522.

We cite this authority because it accurately sets forth the extent of the obligation resting upon a husband, after he has proved that he paid the purchase money. It will be sufficient in order to revive, as it were, a presumption of benefit to the real purchaser, that the judicial mind be satisfied that the husband *did not intend* to give the property to the wife.

From the nature of such a transaction, it is known ordinarily to a few persons only. In the present case, no question of creditors arises. Mr. Avery was not engaged in business, nor did there exist other than perfect harmony of purpose between his wife and himself.

Equity requires clear and convincing proof where a trust is sought to be established by parol testimony. There need not be many witnesses, but their testimony must be such as to compel belief.

SHIDY'S TESTIMONY CLEAR AND UNQUESTIONABLE.

We submit that full reliance can be placed in the deposition of the intimate friend of this married couple, Mr. Leland P. Shidy. For more than twenty-two years he had served in the Coast Survey. At work under Mr. Avery, he learned to estimate the ability and the worth of a man who to ordinary observers was an enigma. He entered into the simple life of these two people, and in the true sense of the word grew to be their friend.

Mr. Shidy is a witness of mental integrity. His replies, which indicate an apprehension of the exact limits of a question, are responsive and clear. He exhibits not a particle of

bias, and he uses words with a nice perception of their meaning. In fine, as we confidently submit, his testimony comes up to the standard which a court of chancery in cases of an alleged trust requires, namely, unequivocal and convincing proof.

The purchase of this house and lot, it seems, was determined upon after numerous discussions in Mr. Shidy's presence.

He gives us the substance of what was agreed upon. The leading feature was that the property, after they were through with it, should go with the rest of Mr. Avery's property to the Smithsonian Institution. It was Mr. Avery's money that was to buy the land, and it was their mutual desire that the fund which ultimately should be in the hands of the Institution as the "Avery fund," should be as large as possible; nor was it to be diminished in any way by the amount of money to be invested in this property. (Rec., 42.)

With this controlling purpose in view, Mr. Avery was willing that Mrs. Avery should have her wish gratified, and the deed be made out in her name. This proposed action was coupled, however, with the condition that Mrs. Avery was to make a will, giving her property to him, just as he had given his to her, it being understood that this would result in the Smithsonian Institution having the house and lot after their death.

Mr. Shidy, while under examination, was not asked whether the proposed will was to give the property to Mr. Avery, and stop at that; or, whether it was to give it to him for life, remainder to the Institution. Perhaps the witness could not have told just what it was agreed that the terms of the will should be; but from his testimony, as a whole, it is manifest that the understanding was substantially that Mrs. Avery should have no greater interest than an estate for life. It is not probable that they overlooked the contingency (which, to be sure, did not seem likely to happen) of Mr. Avery outliving her.

There is no reasonable doubt that they understood that *all* of the property saved by Mr. Avery, from the labor of so many years, was to go upon the death of the survivor as one gift to the Institution.

The court below appear to have reached the conclusion from the whole testimony that "not even a life estate was contemplated to be reserved to her husband in the event of his survival of her, for that event seems to have been considered highly improbable by both of them, in view of Mr. Avery's greater years and feebler health, although it was that event that actually occurred." (Opinion, Rec., 74.)

Mr. Shidy's language surely nowhere warrants this assumption. He says distinctly that the understanding was "that the property was to be hers during her life time, and was to be disposed of at her death in accordance with the will of Mr. Avery, *with the rest of his property*" (Rec., 42). This is entirely consistent with the idea that it was to go to the husband, if he outlived her, and then would pass under his will. The object of her making a will was to secure it against going to her heirs-at-law, and provide also that Mr. Avery should enjoy it so long as he lived.

COX CORROBORATES THE TESTIMONY OF SHIDY.

The testimony of Mr. John F. Cox settles the question, even if Mr. Shidy can be said to have left it in doubt.

Mr. Cox is an attorney-at-law. He was consulted by Mr. and Mrs. Avery, and the two talked with him upon this very subject, each in the other's presence, with nothing whatever to conceal, both having one purpose in view. Mr. Avery gives Mr. Cox a "history" of this purchase. It is not spoken of casually, but distinctly, so as to acquaint Mr. Cox with the facts—how it happened that the title was held by Mrs. Avery.

Mr. Cox testifies that Mrs. Avery said:

"It was their intention at their death to let the *survivor* enjoy the property which Mr. Avery had and she had, during his or her life, and at his or her death it was to go to the Smithsonian Institute." (Rec., 28.)

This was said as stating not an intention that came into existence after the deed had been executed, but an intention that formed an essential feature of the original transaction. It was given to the witness as a part of the "history" of the purchase of the property.

We will, a little later on, present the authorities to the point that Mr. Cox is a competent witness.

The intention of Mr. Avery and his wife, we submit, is proved beyond a reasonable doubt to have been that all the property was to be enjoyed by whichever one outlived the other, and then was to go to the Smithsonian Institution. It is equally apparent that the holding of the title by Mrs. Avery was not considered by either of them as a matter of very great consequence, since their minds were fully made up that the purpose Mr. Avery had at heart would be carried out, whoever held the title. So we see Mr. Avery making a lease in his own name, collecting rent and giving receipts therefor in Mrs. Avery's presence, precisely as if the property were his own. We see Mrs. Avery speaking of it in her note to Mr. Hazelton as if both were owners. These incidents furnish some slight additional evidence that the property was not given outright to Mrs. Avery.

THREE FOUNDATION FACTS FULLY PROVED.

Taking the proof as a whole, we respectfully submit that by unimpeachable testimony we have established the substantial facts set out in our bill, namely:

1. Payment of purchase money by Mr. Avery.
2. Mr. Avery did not intend to give the lot to his wife.
3. Mrs. Avery's ownership was only nominal; if it amounted to a life interest, the beneficial estate subject to that life interest remained in Mr. Avery.

To quote again Mr. Justice HAGNER:

"It is impossible to read the testimony in this cause without becoming convinced that the contentions of the complainants' bill truly represent the case." (Rec., 62.)

TRUSTS—RESULTING AND CONSTRUCTIVE.

2. The doctrine of a trust arising by operation of law in the case where A pays the consideration money and has the deed made to B, is familiar. Equity raises the presumption that A intends that B shall hold the legal title in trust for the benefit of A. The relation between the parties depends upon the intent with which the transaction has been effected. In the absence of testimony, equity raises a a presumption of fact in favor of A's being the true owner.

"The common law notions of title and ownership rested upon the observance of external forms. Equity first introduced the principle that in all the transactions of men concerning land—their transfers and bargains—the consideration is the essential fact which determines the real beneficial ownership, wherever the legal title may be vested." *Pomeroy's Equity Jurisprudence*, sect. 981.

An intent must necessarily have existed on A's part, for he is the actor; and if B is aware of the conveyance and assents thereto, it follows that an agreement between A and B has come into being—that B shall hold the legal title, while A enjoys the beneficial estate.

The trust here recognized by a court of equity has been called into existence really by the parties. The law does not *create* it. It is, therefore, in point of fact, an "express trust," in the sense of expressing the view taken by the parties of their mutual relation to the land. But usage has restricted the term "express trust" to a trust declared in words, which by the statute of frauds must be manifested or proved in writing. Other trusts are termed "implied," being founded on a presumed intention of the parties.

Still, this presumed intention is regarded as an expression of the will and desire of the parties at the time of the transaction. Hence, from a strict point of view, one might declare that in the purchase of land there is no such thing as a trust created by operation of law. It is created by the parties themselves upon a basis of fact.

There is a large class of trusts termed "constructive," and they may be defined as "founded neither on an expressed nor on any presumable intention of the party, but raised by construction of equity without any regard to intention, and simply for the purpose of satisfying the demands of justice and good conscience." *Abbott's Law Dictionary* (1879), Vol. ii, p. 610. Mr. Perry says of constructive trusts:

"They differ from other trusts in that they are not within the intention or contemplation of the parties at the time the contract is made from which they are construed by the court, but they are thrust upon a party contrary to his intention and against his consent." *1 Perry on Trusts*, sect. 166.

Perhaps it would prevent confusion and lead to a clearer conception of the true grounds of equity jurisprudence over the subject of trusts, were the term "constructive trusts" to be extended so as to embrace what are now termed "resulting trusts," since these latter trusts arise by the "implication or construction of law" within the meaning of the phrase as employed in the statute of frauds. Such use of the term has been at times resorted to. Washburn says:

"The term *constructive* trusts is sometimes used in a sense broad enough to embrace such as come properly under the head of *implied* or *resulting* trusts. But, properly speaking, constructive trusts are such as are raised by equity in respect to property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds the legal title."

In the same connection, Prof. Washburn speaks of "the control which courts of chancery exercise over equitable

estates, whereby in case of fraud, mistake or the like, they may require a grantee to hold subject to a trust in favor of the grantor in the nature of a resulting trust." *11 Real Property* (4th Ed.), p. 482.

That is to say, while the parties possess an intention, and have manifested it, yet equity establishes the trust and deals with it, not as the result of agreement, but as a creation of law. The intention is looked at as a part of the evidence, and the law does not raise the trust against the intention of the parties, unless equity and good conscience demand it. Then it will.

A resulting trust may thus *appear* to be created by the agreement of the parties; but on close examination we perceive that equity, in the due administration of its undoubted powers, creates or constructs it, precisely as it creates a constructive trust, just referred to. So it is entirely proper to consider "resulting trusts" as falling within the limits of the larger class of "constructive trusts."

EQUITY WILL PREVENT A WRONG.

The truth is, and every year's decisions serve to emphasize the fact, equity reaches out in all directions to do substantial justice, and to prevent the infliction of a wrong. As well expressed by CHURCH, C. J.,

"The general principles of equity and good conscience applied to certain situations and acts of the parties are used to raise presumptions of intention and to impress property with trusts and to clothe one party with the character and obligations of a trustee, and another with the rights and privileges of a *cestui que trust*, for the purpose of securing honesty and fair dealing among mankind and to prevent fraud." *Foote* v. *Bryant*, 47 N. Y., 544.

Where A has paid the purchase money and had the conveyance made to B, the question for a court of equity is not what is the extent of A's right, but can B keep the land against A's claim for it? Press this question home,

and it becomes clear that the ground upon which equity takes jurisdiction is to prevent injustice and fraud. This consideration brings a so-called resulting trust, as already suggested, within the well-defined meaning of a constructive trust, *i. e.*, a trust created by law.

This line of thought its not without its pertinency, since the opinion of the learned Justice of the Court of Appeals, we observe, deals with the subject of a resulting trust *in strictissimis verbis*, with no thought of applying the broader doctrine of a constructive trust to a proceeding by the heirs that surely is against equity and good conscience.

Mr. Justice HAGNER while sitting as Chancellor, is seen to have felt the force of this wider view of the case: "It is impossible to believe," he says, speaking of Mrs. Avery,

"she would ever have attempted to repudiate this agreement if she had survived the husband without ascribing to her a moral delinquency inconsistent with her other conduct in the transaction and her respect and affection for her husband. It cannot be doubted that if Mr. Avery had entertained the slightest doubt his wife would not carry out fully their cherished plan he never would have allowed the lot to be conveyed to her; or if such doubt had arisen after the execution of the deed that he would promptly have taken measures to enforce the performance of her pledges. To retain the title and repudiate this promise, under force of which it was obtained, would have been a fraud that equity would not have tolerated." (Rec., 64, 65.)

In this forcible language is pointed out the true ground upon which a decision of this case can be made to rest. The defendants who succeed to the strict legal title as heirs-at-law of their sister, are to be regarded in their present attitude as occupying the position that Mrs. Avery would have taken in her lifetime had she repudiated the agreement upon which she entered into possession; or had she attempted to dispose of the estate in fee to a stranger, in violation of the confidence reposed in her by her husband. We shall presently enlarge upon this point. Let us first,

however, enquire for a moment whether the doctrine of a resulting trust strictly so called, does not apply here.

NO OBJECTION THAT MRS. AVERY WAS TO ENJOY A LIFE ESTATE.

3. It was contended below that there could be no resulting trust in favor of the real purchaser, Mr. Avery, because the testimony showed that the grantee (Mrs. Avery) was to enjoy the property for her life. The trust created by operation of law, it was argued, is that the purchaser is immediately entitled to the beneficial estate, which here was to be Mrs. Avery's so long as she lived, a fact inconsistent with the implication of a resulting trust.

Possibly this contention grows out of a misapprehension of the requirement that the trust must result, if at all, at the instant that the deed is taken, and the legal title vests in the grantee. *1 Perry on Trusts*, sect. 133.

The same objection was urged in *Benbow* v. *Townsend* (1 Myl. & K., 506), that the equitable title raised by the parol evidence must be exactly commensurate with the legal title on the face of the instrument, to which the counsel for the opposite party replied, "There is no authority for that position." He cited *Madison* v. *Andrew*, 1 Ves. sen., 58, where a testator inserted his brother's name with his own in a lease of which he obtained a renewal, and as he alone paid the fines and rents and received the profits in his lifetime, it was contended in the suit for administration of his estate, that his brother was a mere trustee; but evidence being produced to show the testator's intention that his brother should have the benefit of the lease if he survived him, it was held that the resulting trust was sufficiently rebutted.

The Master of the Rolls (Sir JOHN LEACH,) though not making his decision turn on this point, said:

"In the case of *Lloyd* v. *Spillett* (2 Atk., 148), and also in the case of *Lane* v. *Dighton* (Amb., 409), it is expressly de-

cided that a resulting trust may be rebutted as to a part of the land comprised in a deed, and prevail as to the remainder; and if it can be rebutted as to part of the land there can be no reason why it may not equally be rebutted as to part of the interest in the land."

Mr. Justice Story, in his *Equity Jurisprudence*, lays it down as settled doctrine that "resulting or implied trusts in such cases may, in like manner, be rebutted as well to part of the land as to part of the interest in the land purchased in the name of another." Vol. ii (Ed. 1877), sect. 1202, p. 445, citing *Benbow* v. *Townsend* as authority.

We have been able to find no adjudicated case that controverts the view announced by the Master of the Rolls, and sanctioned by Mr. Justice Story. On the contrary, its soundness appears to have been taken for granted in more than one decision in this country.

A leading case is *Farley* v. *Blood* (1854), 30 N. H., 372. B, a husband, bought land in 1835 with his own money, and caused a conveyance to be made to F, who thereupon gave a bond to the wife of B to convey the land on request to her. She died in 1850, the husband and wife having occupied the place since its purchase. The evidence adduced to rebut the presumption of advancement to the wife showed that the intention of the husband was to limit the estate to the wife for life as a home for her. *Held*, in a contest made by heirs of the wife, that a trust resulted to the husband.

In *Booth's Appeal* (1868), 35 Conn., 165, brothers and sisters together purchased a piece of land in 1842, under a parol agreement among themselves that A, one of their number, should take the title and hold it in trust for the benefit of their mother during her life, and after her death for themselves. A, in 1843, conveyed the land to B, who had no knowledge of the trust, and B soon afterwards conveyed to C, one of the sisters, she agreeing by parol to carry out the original trust. In 1845 C sold the property to a

stranger, obtaining the price for the same which she held till her death, her mother receiving no benefit from it. In 1856 the mother died. In 1847 C married, and died in 1865. After her marriage, and within six years before her death, she repeatedly acknowledged her indebtedness to her brothers and sisters for their shares of the money received by her.

We are concerned chiefly with the views of the court as to the implied trust, involved in the transaction.

"When the actual agreement between the parties is identical with the agreement which the law will imply from the circumstances, as in this case, there can be no conflict, and no danger that the real intentions of the parties will be defeated by operation of law; such an agreement therefore will not defeat a resulting trust.

"The creation of such an express trust for Mrs. P. was the sole object and purpose of the arrangement, and so far as the agreement may be said to contemplate any further trust it had no other object or purpose than to secure to those who advanced the money their interest on the termination of the trust for the mother. So far then as there was any trust in favor of the heirs who advanced the money, it was such as the law would have implied, or would by implication have resulted to them from the mere fact that they furnished the money for that purpose." *Per* CARPENTER, J.

Compare *Robinson* v. *Leflore* (1881), 59 Miss., 148, where the court say:

"The resulting trust which arises in such a case from the facts and the relation of the parties is not destroyed by the verbal and therefore void contract that the lender of the money who attends the sale shall hold it in trust for her."

The point was expressly decided in Iowa, at a date when Judge Dillon and Judge Wright (afterwards Chief Justice) were on the bench, the opinion being delivered by BECK, C. J. In 1857 a husband bought land out of his own means and

had it conveyed to his wife, under an agreement with her that she would convey to him, or to whomsoever he might assign his interest therein, upon request so to do. Their object was to save costs and trouble, and to have the legal title vested in his wife in case he should die. They occupied the property as a homestead. The wife died in 1862. He brought a bill in equity against an adopted child having the rights of a child of the parties, to have title vested in him. The petition was dismissed below, but on appeal the court reversed the judgment.

One objection urged was that the petition showed the existence of an express trust, not in writing.

BECK, C. J. "It cannot be that the consent of the trustee to hold the title for the benefit of the *cestui que trust*, or an agreement so to do, in case of a resulting trust, will change its character. By an agreement the trustee simply assents to an obligation imposed by the law. The trust would exist without the agreement by operation of law. The agreement cannot destroy the effect of the conditions under which the law presumes the estate is held by the trustee." *Cotton* v. *Wood* (1868), 25 Iowa, 43.

The decision was undoubtedly right. The resulting trust had the effect to vest the beneficial estate solely in the husband, but so long as he did not ask his wife to convey the land such enjoyment of the beneficial estate by him remained suspended.

The fact that a party receiving a conveyance of land verbally agreed at the time with the person paying the consideration that the former should upon demand execute a conveyance to the latter of the premises, does not make the trust express as distinguished from one implied by law from the act of the parties, so as to exclude proof by parol. *Bayles* v. *Baxter* (1863), 22 Cal., 575.

A bill may set out facts which constitute a verbal agreement in relation to land, tending to create a trust contrary to the seventh section of the statute of frauds, and though

the evidence does show an agreement, the court will look to see if the consideration be paid and declare it a resulting trust. *Keller* v. *Kunkel*, 46 Md., 565.

A recent case in New Hampshire (*Converse* v. *Noyes*, 66 N. H., 570), well illustrates the proposition that equity will declare the existence of a resulting trust where a parol agreement of the parties, having in view similar results, has failed because of the statute.

A farm was conveyed to N by a deed of trust, the condition of which was that N should hold the premises during her life, and at her decease the title should vest in her heirs in fee. Later she conveyed her life estate to R. Her heirs, joining in the deed, also conveyed to R their reversionary interest for the sum of $2,000. The heirs signed the deed to R upon an agreement with N (their mother) that the title to the money received by her from the sale of the farm should remain the same as the title to the farm before the conveyance to R. Shortly afterward the heirs consented that their mother should purchase a lot of land, and pay therefor $1,500 of the money received from R, on condition that the title to the new property should be the same as the title to the farm. N took the deed of the new property in her own name, not mentioning the heirs, and paying for it from the R money.

N, before selling the farm, had married a second time. Upon her death her husband claimed the interest and income of one-third of the new property during his life-time. Her children brought a bill in equity to enforce a resulting trust, which they claimed was created in their favor from the fact that the new property had been bought with the money received from R for the farm.

CLARK, J. "The parol agreement alleged by the plaintiffs, that the title to the Penacook property should be the same as the title to the Shepard farm before the sale to Randall, is immaterial because if proved it would be ineffectual. 'No trust concerning lands, excepting such as

may arise or result by implication of law, shall be created or declared unless by an instrument signed by the party creating the same or by his attorney.' G. L., 135, sect. 13. When land conveyed to one person is paid for by or with the money of another a trust results to the latter, which is not within the statute of frauds. The ownership of the money may be shown by parol evidence. *Page* v. *Page*, 8 N. H., 187; *Hall* v. *Congden*, 56 N. H., 279; *Blodgett* v. *Hildreth*, 103 Mass., 484.

"The sale of the Shepard farm to Randall converted a trust estate into money which was held by Mrs. Noyes subject to the conditions of the trust imposed upon the land. As she had an estate for life in the land she had an estate for life in the money received for it; and as money does not belong to that description of property of which the use determines with the consumption, she was entitled to the income and interest only, and the money was the property of the owners of the reversion in the Shepard farm. *French* v. *Hatch*, 28 N. H., 331; *Healey* v. *Toppan*, 45 N. H., 243. The two thousand dollars received by Mrs. Noyes from Randall belonged to the plaintiff, subject to the right of Mrs. Noyes to the income during her life. With the assent of the plaintiffs Mrs. Noyes purchased the Penacook property with that money, and by reason of the ownership of the money a trust resulted in the favor of the plaintiffs, and from the facts stated in the bill they are the owners of the property."

That the *intention*, as between husband and wife, will be carried out by equity, even where at the time no money is paid by the former, but the understanding of the parties is plainly shown to the court, see the recent case of *Gray* v. *Jordan*. A husband bought a farm and had it conveyed to his wife, with the intention of paying for it himself. The wife gave her notes, secured by a mortgage of the land, and the husband afterward paid the notes out of his own money, in pursuance of an original intention, not intending the conveyance or the payment to be a gift to the wife. *Held*, a resulting trust in favor of the husband. 87 Me., 140.

So, in *Milner* v. *Freeman* (1882), 40 Ark., 62, where a husband had land, which he had paid for, put in the name

of his wife under the mistaken impression that it would vest a title in them jointly. They occupied the premises. The wife died childless, and her brothers and sisters claimed title. The husband was old and feeble, and did not expect to live long. The court decreed a trust on the ground that the husband did not intend an absolute gift to the wife. The fact that by agreement she was to occupy jointly with him did not in this case prevent a resulting trust to him, which upon her death sufficed to entitle him to be vested with the legal estate.

A husband bought land, having the deed made to his wife, upon an agreement that she would make a will devising the property to him. Upon the authority of *Livingston* v. *Livingston*, 2 John. Ch., 537, the Supreme Court of the District of Columbia held that a trust resulted to the husband. *Sherman* v. *Sherman* (1892), 20 D. C., 330. This decision is important as showing what has been the attitude of the court in this District, in such cases involving property rights.

No objection whatever in these instances was found in the fact that a parol agreement between husband and wife contemplated her having a certain interest or estate in the land.

A resulting trust rests upon a presumption of fact. This presumption may be affected by parol evidence to the extent of rebutting it in whole or in part. To rebut the presumption in part is not to destroy it.

In the case at bar the presumption is that Mrs. Avery held the land in trust for her husband, who had paid for it, and who had no intention of giving it to her outright. This presumption, however, is modified by the parol testimony, which shows that she was to enjoy it for her life. Such a limited beneficial interest does not prevent the fee of the land, as viewed in a court of equity, from being held by the husband.

We have proved that the holding of the land by Mrs.

Avery, as trustee for her husband, is not inconsistent with the terms of the agreement entered into between them at the time he bought the property. The beneficial estate vested in him immediately upon the purchase. A court of equity will execute the trust, and declare the title to have passed under his will to the complainants.

IT IS CONSTRUCTIVE FRAUD ON THE PART OF THE HEIRS TO CLAIM THIS LAND.

4. There is another ground upon which the complainant has a right to relief. As already suggested, we are entitled to invoke the broad principle that it is against equity and good conscience for the heirs of Mrs. Avery to claim this land. Because Mrs. Avery died without having divested herself of the strict legal title (as she had agreed to do, and intended to do), her heirs at law are using the strict legal title of record to get possession of property which, in equity and good conscience, does not belong to them. They have no other or better claim to this property than Mrs. Avery herself had. In their present attitude they must be treated precisely as Mrs. Avery would have been treated, had she in her lifetime presumed to convey the land in fee simple to a stranger.

Of course, Mrs. Avery, as a matter of fact, did not claim to be absolute owner. For her to have done so would have been to violate the trust and confidence reposed in her by her husband. Mrs. Avery had no thought of doing such a thing. It was her earnest desire and hope that the property should go to the Smithsonian Institution. Her heirs are to be regarded as her representatives; and their present conduct requires that the case be considered as if she *had* repudiated the agreement upon which the legal title had been put in her name.

Where one takes a conveyance for a lawful and specific purpose and attempts to retain the property in violation of

the agreement, in fraud of the real owner, equity will exercise its remedial power. *Carr* v. *Carr* (1873), 52 N. Y., 25. It makes little difference whether a remedy is afforded by way of enforcing a "constructive trust," or upon the general ground of preventing fraud, the jurisdiction of a court of equity to this end is well established.

"Constructive trusts," says Spence, "may arise not only where property has been acquired by fraud or improper means, but also where it has been fairly and properly acquired, but it is contrary to some principle of equity that it should be retained by the party in whom it is vested, at least for his own benefit. *1 Eq. Jurisd.*, sect. 511.

FRAUDULENT USE OF A DEED.

A familiar case is afforded where a grantee who is in possession under a deed, absolute in terms, that has been given really as a mortgage, undertakes to set up the instrument as an absolute conveyance. Here chancery takes jurisdiction, on the ground of a fraudulent *use* of the instrument. *Wright* v. *Bales*, 13 Vt., 349. This court has said that the object with which a deed is given constitutes a ground for the exercise of the jurisdiction of a court of equity "which will always be asserted to prevent fraud or oppression, and to promote justice." *Peugh* v. *Davis*, 96 U. S., 336.

It is not needful to bring forward many authorities to illustrate the ways in which chancery interferes to prevent fraud in this class of cases; one or two decisions, however, may properly be referred to.

If a grantee or devisee obtain a deed or devise by means of promises to hold the land for another, this is sufficient to raise a trust in favor of the latter on the ground of fraud, and this may be proved by parol. *Hoge* v. *Hoge*, 1 Watts, 163.

Defendant at a foreclosure sale purchased the property under a verbal agreement with the mortgagor that he should

buy the land for the mortgagor and hold it for his benefit. Upon bringing bill to enforce this agreement the statute of frauds was pleaded by the defendant. *Held*, that the statute is not to be used to defend fraud, and if one party executes a void contract relying on it, the other is bound as a trustee *ex maleficio* to execute it too. *Ryan* v. *Dox*, 34 N. Y., 301. The Chief Justice cites numerous authorities to the effect that one who receives a deed of real estate, in consideration of a verbal promise to hold it for the benefit of another person, is to be held as a trustee for such person.

CONFIDENTIAL RELATION OF HUSBAND AND WIFE.

A wife conveyed a lot of land to her husband on his verbal promise to hold and manage it for the benefit of their children. A bill by the children to execute the trust was sustained. It was held to be unnecessary to offer evidence tending to show that the husband did not intend to keep his promise when he received the deed. "He is presumed to have intended to do, when he obtained the property, what he finally did do." *Larmon* v. *Knight*, 140 Ill., 232.

Mr. Avery, we repeat, reposed a trust and confidence in his wife. This fact coupled with the circumstance that he paid the purchase money with no intention of giving the estate to her *and her heirs*, constitutes her heirs trustees of the legal title to convey it to Mr. Avery's devisees. The case falls within the principles so clearly enunciated in a leading decision in the New York Court of Appeals. A mother, upon an oral promise to hold the interest acquired and reconvey to him, induced her son, who had just come of age, to confess a judgment in her favor for $2,000, which sum she said that he owed her, but he said was a gift. She redeemed his land, and got a sheriff's deed of it, he thinking it to be for his protection. On demand and tender she refused to convey to him.

The court in a most carefully considered opinion by

ANDREWS, J., held that, on account of the confidential relation between the two, *and the parol agreement*, the son was entitled to relief, notwithstanding the statute of frauds. *Wood* v. *Rabe* (1884), 96 N. Y., 426.

"It was on the part of the son the case of a confidence induced not by the bare promise of another, but by the promises and the confidential relation conjoined. The confidence, in fact, had its spring and origin in the relation, and that relation was a controlling ingredient moving his action. It would be a gross wrong to permit that confidence to be betrayed, and we are of opinion that the statute of frauds cannot be invoked as a bar to relief. The principle that, when one uses a confidential relation to acquire an advantage which he ought not in equity and good conscience to retain, the court will convert him into a trustee, and compel him to restore what he has unjustly acquired, or seeks unjustly to retain, has frequently been applied to transactions within the statute of frauds. . . .

"The trust sought to be enforced in this case does not arise exclusively from the agreement, but from the agreement in connection with the other circumstances, the interest of the plaintiff in the land, the confidential relation of the parties, the fact that he acted without independent advice, and the injustice which would result in case the agreement should not be enforced. Therefore, without passing upon the question whether independently of the peculiar circumstances attending the agreement, it could be enforced in equity, we are of opinion that, upon the case as presented, the agreement, in connection with the circumstances, make out a case for relief, notwithstanding the statute. See *Heron* v. *Heron*, 2 Atk., 160; *Young* v. *Peachy*, id., 254; *Ryan* v. *Dox*, 34 N. Y., 307; *Perry on Trusts*, sect. 226."

Husband and wife purchased real estate, and title was taken in the name of the wife, upon an agreement that they should live on the land and together pay the purchase money, and that after it had been paid the wife should make a deed of an undivided half to her husband. The husband fully performed the agreement, but the wife con-

veyed the land to A without consideration. *Held*, on filing a bill, that husband had stated a good cause of action. *Gage* v. *Gage* (1894), 83 Hun., 362.

The principle of a trust springing out of the circumstances where the confidential relation of husband and wife exists, and a verbal agreement is relied on, is exemplified by the case of *Brison* v. *Brison*, 90 Cal., 323.

"The confidence which he had in his wife was the inducement which led him to place the property in her name. . . . While these acts, if the plaintiff had been dealing with a stranger, might not create an enforceable trust, yet with his wife they did; and her subsequent refusal to reconvey was not merely the breach of an agreement, but was the betrayal of a confidence, and the violation of a trust, constituting a constructive fraud, which a court of equity will remedy." Per HARRISON, J. (p. 336).

Plaintiff had conveyed real estate to defendant (whose wife was the niece and adopted daughter of plaintiff), on the promise by defendant to manage the property and reconvey upon request. Afterwards the defendant "conceived the design of claiming the same as his own." The court enforced the verbal agreement, giving weight to the fiduciary relations existing between grantor and grantee. *Alaniz* v. *Casenave*, 91 Cal., 41. To the objection that it did not appear that a fraudulent intent existed at the time of the conveyance, but on the contrary it did not exist, the court quotes from *Feeney* v. *Howard*, 79 Cal., 525:

"If by means of a parol promise to reconvey, a party obtains an absolute deed without consideration from one to whom he stands in a fiduciary relation, the violation of the promise is constructive fraud, although at the time of the promise there was no intention not to perform."

RULE WELL ESTABLISHED IN ENGLAND.

Where a defendant seeks to use the statute of frauds to keep property, which by reason of a parol agreement he

has no moral right to retain, the English court of chancery has not hesitated to take jurisdiction on the ground of fraud, and afford relief in spite of the statute. A leading case is *Haigh* v. *Kaye* (1872), 7 Ch. App., 469.

Plaintiff, fearing an adverse decision in a suit in chancery, conveyed an estate to the defendant (his brother-in-law) by absolute deed. No money passed. Plaintiff alleged that he conveyed to defendant as a trustee. Defendant admitted there was no consideration, and that it was understood he should account for the rents until he could make arrangement for paying the purchase money, and if no arrangement could be made he should re-convey. Defendant claimed to hold the estate discharged of any trust, and claimed the benefit of the statute of frauds.

The court below held that the statute did not apply, and that defendant was a trustee of plaintiff. The Court of Appeals affirmed the judgment.

"If a defendant means to say that he claims to hold property given to him for an immoral purpose, in violation of all honor and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it. . . . I apprehend it is clear that the statute of frauds was never intended to prevent the court of equity from giving relief in a case of a plain, clear and deliberate fraud." Per JAMES, L. J. (p. 474).

This is an instance, as the court stigmatizes it, of plain fraud. The court in argument refers to a similar ruling in *Davies* v. *Otty*, 35 Beav., 208, where one attempted to set up the statute of frauds who claimed under an absolute conveyance instead of a mortgage.

A recent decision, much in point, is *Davis* v. *Whitehead* (1894), L. R., 2 Ch. Div., 133. By an indenture, in 1890, the Duchess of Marlborough, in consideration of love and affection, assigned to her husband a leasehold house belonging to her. The deed was in form an absolute assignment.

This was done to enable the husband to mortgage it in his own name, and he did mortgage it, to pay his debts. The Duchess joined with the Duke in covenanting to pay the mortgage debt, but the equity of redemption was reserved to the Duke alone. The Duke died in 1892, and the Duchess claimed the house as her own, subject to the mortgage. She testified that her husband was to re-assign the house to her. "The understanding was that the house was mine."

In a creditor's action, plaintiff argued that the house should be treated as the Duke's estate, there could be no trust because of the statute of frauds.

The court, following the decision in *Haigh* v. *Kaye*, held that the statute could not be successfully pleaded.

"If the late Duke of Marlborough had in his lifetime refused to convey the equity of redemption at the request of the Duchess, I think he could not have set up the statute. Nothing of the kind ever happened; on the contrary, the evidence appears to show that he was willing and intended to re-convey, though unhappily he put off carrying his expressed intention into effect until it was too late. In my opinion the plaintiff, as claiming under him, is in no better position, and I think the inquiry should be answered by finding that the equity of redemption belongs to the defendant, the Duchess of Marlborough." *Per* TAYLOR, J. (page 146).

THE CASES CONTRA.

Such decisions as are to the contrary of our contention will be seen to be rested, one and all, upon the ground of a rigid adherence to the terms of the statute. Precisely the same reasoning is employed to uphold the statute in these cases as was used time and time again to resist the rule allowing parol testimony for the purpose of showing that a conveyance absolute on its face is really a mortgage, yet after a long struggle this salutary rule has been firmly established. Nobody questions its wholesome effect. See remarks of ALLEN, J., in *Carr* v. *Carr* (1873), 52 N. Y., 260.

OUR COURTS HAVE ADVANCED IN THEIR VIEWS AS TO TAKING JURISDICTION, AND AFFORDING RELIEF IN THIS CLASS OF CASES.

At this point we may pause for a moment to observe the tendency of our equity courts more readily to assume jurisdiction and administer relief, than formerly, in cases where constructive fraud would otherwise defeat the ends of justice. The struggle just referred to, in regard to mortgages that were in terms absolute conveyances, furnishes a valuable illustration of the growth of equitable remedy, in this important field.

The ground upon which jurisdiction is asserted in the case of an absolute deed given only as security, is that it is against equity and good conscience for the mortgagee to hold on to the land. It was only after years of contention that our courts would see in a transaction of this nature the means of working a fraud, and for that reason would afford a remedy. As yet the state courts are not altogether agreed as to the basis of their jurisdiction. *1 Jones on Mortgages*, 2d. Ed., sect. 321.

Some place it upon the ground of fraud or mistake. Others hold that the fact of a mortgage being intended (as evidenced by a loan of money) renders the transaction one of that class in respect to which equity takes jurisdiction growing out of the subject matter. They hold it to be of no consequence what the terms of the agreement may be between the parties, so long as it appears, from parol evidence, that the object in view is to secure the lender. Equity considers the character of the transaction rather than the specific terms of the agreement between the parties.

In this view it is argued that the nature of taking security is such as to put in the hands of the lender a means of inflicting injustice, that under the guise of a loan an absolute deed may be taken by way of extortion. Consequently it is a safe rule to accord to equity the power to investigate

all such dealings and, when the fact of a loan of money is proved, to assume jurisdiction to work out the rightful result.

This latter doctrine has the sanction of the Supreme Court of the United States. *Russell* v. *Southard*, 12 How., 139; *Peugh* v. *Davis*, 96 U. S., 332.

In three states, Ohio, Wisconsin and Texas, the courts say that the circumstances prove a trust; that the grantee is in equity a trustee for the grantor. This trust is founded upon the fraud that would be the result of a refusal on the part of the grantee to conform to what was the real purpose of the parties.

A few other states, including Vermont, uphold the theory that the fraud consists in the subsequent wrongful use of the deed. They maintain that it is open to prove by parol testimony that the transaction was really a mortgage. This not to contradict the deed, or to alter its terms, but to show the circumstances under which it was given, and thereby to show that a fraudulent use of the deed was subsequently made by the grantee.

This divergence of views is, perhaps, not to be wondered at. It was very difficult for the courts, made up of lawyers grounded firmly in the doctrines of the common law, to consent to make an inroad, as it were, upon the established doctrine of the statute of frauds. In yielding to this reform, each judge appears to have cast about for some reason or other to justify the new departure. Some of the arguments advanced in these opinions may, with all due respect, be characterized as specious and over subtle. They indicate a veiled unwillingness to come out and boldly state what is, after all, the only true ground upon which the decision could be put.

Notwithstanding the diversity in the opinions of these various tribunals that reach a common result, it is manifest that the real, underlying reason of each decision is fraud. By this term is not meant necessarily an actual fraud as

dealt with in most cases under that head. There need be no fraudulent intention on the part of the mortgagee at the time that the deed is taken; but his later action is held to be contrary to equity and good conscience, and to that extent is, in the view of the chancellor, fraudulent conduct.

CONTRARY DECISIONS NOT IN ACCORD WITH THE BETTER OPINION HERE, OR THE SETTLED RULE IN ENGLAND.

A leading case in which the view contrary to that we contend for, is ably argued is *Rasdall* v. *Rasdall* (1859), 9 Wisc., 391. The following extract from the opinion (COLE, J.), illustrates what we say of the character of the reasoning that has hitherto supported such conclusions:

"I can see no distinction between an express trust and a parol agreement making a deed a mortgage. If the refusal to abide by the latter is to be held on principle to be such a fraud as takes the case out of the rule and justifies parol evidence, I can see no reason why a refusal to execute an express trust evidenced only by parol should not be so held. The injustice, the wrong and the fraud are not only as great, but greater in the latter case than in the former. For in the former the party would only get the land for the money he had loaned, while in the latter he would get it for nothing. And if these cases are to be held correct upon principle, we can see no reason why the refusal by any party to perform a parol agreement, within the statute of frauds, should not be held such a fraud as would take the case out of the statute whenever such refusal would work hardship and injustice upon the opposite party. But we must say that we think these decisions cannot be sustained upon principle, and that if established by authority too firmly to be shaken, it must be regarded as an invasion upon the statute which cannot justify still further encroachment. And it is perhaps not so settled on authority as to be beyond question."

The real question at issue, it is plain to see, is, shall the statute of frauds be used as a cover for fraud? The de-

cisions in England, and as we believe the weight of authority in this country, are to the effect that equity has full power to deal with these cases of an attempt by means of the statute to perpetrate a fraud—and formulate its decree in each as it arises. In so doing a court of equity but preserves the spirit of the statute.

The trust that a court enforces, in order to protect a complainant against this species of fraud, is implied. It rests upon the fact that an attempt at fraud is proposed. The mere circumstance that the result reached is the same as if the court had enforced the parol agreement of the parties, is, after all, a coincidence merely. As Lord WESTBURY has well phrased it:

"The court does not set aside the act of Parliament, but it fastens upon the individual who gets the title under that act, and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud." *McCormick* v. *Grogan*, L. R., 4 E. & I. Appeals, 82.

CANNOT BE THAT MRS. AVERY SHOULD REPUDIATE HER AGREEMENT.

In granting relief against fraud the proof must satisfy the conscience of the chancellor or court. *I Story's Eq. Jur.* (12th Ed.), sect. 190 *a*. Here the chancellor has in no uncertain terms expressed his opinion as to the duty owed by Mrs. Avery to her husband.

"It is impossible to believe she would ever have attempted to repudiate this agreement if she had survived the husband without ascribing to her a moral delinquency inconsistent with her other conduct in the transaction and her respect and affection for her husband. . . . To retain the title and repudiate this promise under force of which it was obtained, would have been a fraud that equity would not have tolerated.

"As the wife, if living, upon the proofs here would be compelled by chancery to execute all needful conveyances

to confirm the title to the Institution, so the defendants who claim as her heirs-at-law have their consciences affected by the proofs and should be made to comply with the duty that devolved upon their intestate." (Rec., pp. 63, 64.)

We submit that this position is entirely sound.

COURT BELOW DOES NOT DENY THAT SUCH IS THE LAW.

It is to be noted that the Court of Appeals, which was unable to find in the testimony satisfactory proof that it was the money of Robert S. Avery and not that of his wife that was paid for the property, says that it does not "dissent from the statement of the law by the learned justice who heard this case in the court below, as contained in his very able and elaborate opinion which we find in the record; but we fail to find in the record the testimony which in our opinion is required to support it." (Rec., 74.)

That is to say, the appellate court, did not believe that the deed was made upon an understanding between husband and wife that she should dispose of the property at her death in accordance with the will of Mr. Avery, with the rest of his property (Rec., 41). It must have reached the conclusion that Mr. Shidy was mistaken.

We prefer to stand with Judge Hagner, who takes up the testimony in detail, and discusses it, and after remarking that "not a word of evidence in contradiction of the plaintiff's contention is offered in the part of the defendants (Rec., 64), declares it as his opinion that "it is impossible to read the testimony in this cause without becoming convinced that the contentions of the complainant's bill truly represent the case." (Rec., 62.)

III.

Mr. Cox is a Competent Witness.

There can be no possible objection to the competence of Mr. Cox as a witness.

His testimony as to statements made to him by both Mr. and Mrs. Avery in the presence of each other is undoubtedly admissible. There was no occasion for confidences as against each other, and both were inspired with the same purpose.

The rule of privileged communication does not apply to the case of husband and wife together consulting freely and harmoniously with an attorney for the purpose of drawing up their wills. *Gulick* v. *Gulick*, 38 N. J., Equity, 402; *Russell* v. *Jackson*, 9 Hare, 392; *Greenleaf's Law of Evidence* (15th ed.,) Vol. i, sect. 241, note *c*.

Where both parties are present at a time when a communication is made by one of them to his attorney or counsel, there is nothing confidential in the communication. *Whitney* v. *Barney*, 30 N. Y., 330.

"We have held, on more than one occasion, that there can be no privilege where both parties hear the communications, and where they are not made by a client confidentially to obtain counsel. *House* v. *House*, 61 Mich., 69, and cases cited. In the present case neither party sought Stellwagen separately or confidentially. Both went together, and counsel cannot very well represent, as such, two conflicting litigants. The case presents no features having anything to do with professional confidence. Neither made or expected to make any communication which was to be concealed from the other. Stellwagen should have been allowed to testify. Per CAMPBELL, C. J. *Cady* v. *Walker*, 62 Mich., 158.

An attorney at law who drew a declaration of homestead, and who was, at the time, apparently acting for the deceased and his wife in the matter, was interrogated on behalf of contestant as to whether the recital in the declaration of homestead was explained to Mrs. B., if she understood it, what explanation was given and what she knew about the matter. This was objected to, on the ground that it called for a privileged communication between attorney and client. The objection was sustained and the ruling excepted to.

The appellate court said:

"The objection should have been overruled. When two persons address a lawyer as their common agent, their communications to the lawyer, as far as concerns strangers, will be privileged, but as to themselves, they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiation." *In re Bauer*, 79 Cal., 312.

IV.

The $1,000 Legacy to Defendants Has Been Forfeited.

The equity court rightly decided that the condition attached to the legacy of $1,000 was a valid one, and that the legatees had forfeited the bequest by claiming possession of the A street lot and putting the Smithsonian Institution to the expense of this suit.

The language of the will (Rec., 7) is as follows:

"I bequeath to the sister and brothers of my late wife one thousand dollars ($1,000), to be equally divided between them. I have already given these last over a thousand dollars which my wife inherited from her father, also clothing and other gifts, thus equalizing, substantially, my gifts to her family and to mine. These bequests are all made upon the condition that the legatees acquiesce in this will; and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named."

Mr. Roper says:

"When legacies are given to persons upon conditions not to dispute the validity of, or the dispositions in, wills or testaments, the conditions are in general not obligatory, but only *in terrorem*. If, therefore, there exist *probabilis causa litigandi* the non-observance of the condition will not be forfeiture. *Powell* v. *Morgan*, 2 Vern., 90; *Morris* v. *Burroughs*, 1 Atk., 404; *Lloyd* v. *Spillet*, 3 P. Wms., 344. The reason seems to be this: a court of equity does not

consider that the testator meant such a clause to determine his bounty, if the legatee resorted to such a tribunal to ascertain doubtful rights under the will, or how far his other interests might be affected by it; but merely to guard against vexatious litigation.

But when the acquiscence of the legatee appears to be a material ingredient in the gift, which is made to *determine* upon his controverting the will or any of its provisions, and in either of those events the legacy is given over to another person, the restriction no longer continues a condition *in terrorem*, but assumes the character of a *conditional limitation;* the bequest is only *quousque*, the legatee shall refrain from disturbing the will; and, if he controvert it, his interest will cease and pass to the other legatee." *Roper on Legacies*, Vol. i, p. 795.

"If the testator *direct* the legacy to fall in to the *residue* upon a breach of the condition and *dispose* of that fund, the *residuary legatee* will be a particular legatee of the individual legacy, and, as such, be entitled to it if the condition be broken. *Lloyd* v. *Branton*, 3 Meriv., 118." *Ibid*, 796.

THE TESTATOR IMPOSED A CONDITION UPON HIS BEQUEST.

His wife's relatives had no claim whatever upon the bounty of Mr. Avery, but desiring to equalize, substantially, his gifts to the family of his wife and those to his own relatives, he made the bequest. In order to guard against the danger of diminishing the Avery fund by bringing his will into litigation, the testator expressly enjoins that his bequests are made upon the condition that the legatees acquiesce in the will. He goes further. He bequeathes the share of any disputing the will to the Smithsonian Institution.

The language of the Court of Appeals on this point is as follows:

"With reference to the legacy of $1,000 given to the appellants by the testator Robert S. Avery, and which is

sought to be forfeited in this proceeding on account of the alleged disputing of the will by the appellant, it is not seriously controverted by the appellee that the decree of the court must be modified. Forfeiture is not greatly favored in equity under any circumstances; and this case is not one for the enforcement of a forfeiture. It may be suspected that the claim of the appellants to the property in dispute was the very thing against which the testator was solicitous to guard; but clearer and more unequivocal language for that purpose should have been used to justify a court of equity in decreeing a forfeiture in this case. Claiming property which it is contended did not pass under the will, and which we here hold did not pass under the will, cannot in any proper legal sense be regarded as a disputing of the will." Per MORRIS, J. (Rec., 74).

It is just possible that what is here said of the view maintained by us in respect to Judge HAGNER'S decree may lead to a misapprehension of the attitude of counsel in this particular. For this reason we take leave to quote from our brief before the Court of Appeals, as follows:

"The learned Judge below treated the legacy of $1,000 as a subject of forfeiture, and stated the conditions under which he would decline to 'enforce the forfeiture.' We are unable to adopt this view of the right of the Smithsonian Institution to the money given them in express terms, when the wife's relatives should refuse to acquiesce in the will. We conceive that no question arises here of enforcing a forfeiture. The court was asked to direct the executrix. This request was in the nature of seeking a construction of the will; or, to be more exact, it was praying the court to find as a *fact* that the defendants had disputed the will. The condition which the testator attached to the bequest executes itself. Equity not enforcing a forfeiture does not apply to a limitation over such as this. The doctrine is confined to conditions arising out of agreements, such as covenants in leases, or contracts generally.

"We submit that there was no room for the court below to give to the defendants this one thousand dollars upon their 'relinquishing their opposition.'

"Their refusal to conform to the suggestion of the opinion,

and their prompt appeal to this court works the same result as if the decree had declared the $1,000 payable to the Smithsonian Institution outright.

"We ask that the decree below be affirmed, except so far as this court shall see fit to modify it, so as to ensure our absolute title to the $1,000 in question."

THE CONDITION OF ACQUIESCING IN THE WILL HAS BEEN BROKEN.

The heirs-at-law (appellees) are far from acquiescing in Mr. Avery's will. They are disputing the devise of the A street lot, and at the same time claiming the $1,000 legacy. They have failed to observe the condition that the testator attached to his bequest to them. They are trying to diminish the amount of the Avery fund.

They cannot make a formal demand for possession of the A street lot, as against the plain language of the will, and at the same time hold on to this legacy. If their contention be true that the A street lot belongs to them, then obviously the doctrine of election applies. *Boughton* v. *Boughton*, 2 Ves. sen., 12; *Rogers* v. *Law*, 1 Black, 253. If their contention be unfounded, as we submit it is, they have nevertheless chosen to put the estate and the residuary legatee to the expense of this suit, and it is now too late to deny that they have not "acquiesced" in the will. They have made their election.

What "clearer and more unequivocal language" Mr. Avery could have employed (as is suggested by the Court of Appeals he should have done), we confess that we do not know. The will on the face shows that the testator is disposing, among other things, of a lot, the title to which stands in his wife's name (Rec., 7). He says distinctly: "These bequests are all made upon *the condition* that the legatee acquiesce in this will, and I hereby bequeath the share or shares of *any disputing* this will to the residuary legatee hereinafter named." Is this not plain enough?

Although unable to agree with the chancellor that he had power to permit the heirs to take the legacy on condition that they should relinquish their opposition to the claim of the A street lot, we heartily commend to the court the able presentation of the doctrine of conditions in wills, and election by a legatee, to be found in Mr. Justice HAGNER'S opinion (Rec., 64, 65). The question as to remitting a forfeiture, however, long ago dropped out of the case. We respectfully submit that the Court of Appeals fell into error in deciding that the appellees are entitled to the legacy.

For the reasons thus stated, we ask the court to reverse with costs the decree of the Court of Appeals, and to remand the cause to that court, with directions to affirm with costs the decree of the Supreme Court of the District of Columbia (Rec., 56, 57), except that it shall require the said Supreme Court to direct Julia N. Avery, executrix, to treat the one thousand dollars given to the appellees in this cause, as forfeited for breach of condition, and as having fallen into the residuum, and become payable to this appellant—the Smithsonian Institution.

FRANK W. HACKETT,
For Appellant.

BRIEF FOR APPELLEES

IN THE

Supreme Court of the United States.

THE SMITHSONIAN INSTITUTION, *Appellant*,

vs.

LEVI W. MEECH ET AL, *Appellees.*

No. 190.

BRIEF FOR APPELLEES.

Statement of the Case.

On the 20th of April, 1885, one Timothy Sands, by his deed of indenture of that date, conveyed in fee-simple the property in controversy in this case to Lydia T. Avery, then the wife of Robert S. Avery, "unto and to the only use and benefit of said Lydia Tyler Avery, her heirs and assigns." The deed on its face recites a consideration of $3,500 to the grantor "in hand paid by the said party of the second part."

Without having in any way disposed of this property, Mrs. Avery died intestate on the 10th of November, 1890. There were no children of the marriage. The heirs of Mrs. Avery are Levi, Stephen and William Meech, and Lucy M. Lord, who are the real parties in interest in this case.

On the 12th of September, 1894, Robert S. Avery, the husband, also died. By the residuary clause of his last will and testament, dated July 22, 1893, he devised and bequeathed nearly all of his estate, real and personal, to the Smithsonian

Institution. Following the residuary clause of his will he uses the following language:

"The property known as part of lot 2 (two) in square 787, in the city of Washington, D. C., being premises No. 326 A St. S. E., is my property, although the title stands in my wife's name. I include it in the residuary bequest to the Smithsonian Institution."

The property thus described is that which was conveyed, as above stated, to Mrs. Avery and of which she died intestate.

By virtue of this clause the Smithsonian Institution claims the property and has filed this bill against Mrs. Avery's heirs to enforce its alleged title.

The material averments of the bill in respect of the testator's alleged title to the property and his right to devise it to the complainant are, first, that Mr. Avery paid from his own means the purchase-money, though directing the deed to be made to his wife; and, secondly—

"That at the time of the purchase of this property by Mr. Avery it was *expressly agreed* by and between himself and his wife that said premises were to be deeded to her, not to give her the fee-simple title to the same nor even to give her a life interest absolutely therein, but solely for the purpose of providing for her in the event of her husband dying before she should die, as that appeared almost certain would happen, and that Mrs. Avery was to make her will, giving the same to her husband, so that the general purpose of his will should apply to this after-acquired real estate."

Filed with the testimony (Rec. p. 30) is an affidavit of Mr. Avery, referred to in the bill (Rec. p. 5.) This affidavit was made two years after the death of his wife, and an extract from it is here given as showing the character of the case presented by the bill, as the affidavit may be said to be a part of it:

"At the time of said purchase he [Avery] was not in good health, and his wife, Lydia Tyler Avery, being of the opinion that

she would outlive him, he permitted said property to be tranferred to her upon the then *expressed condition* that she was to make a will in his favor in the event of his surviving her, as he had already done in her favor in the event of her surviving him, the mutual understanding being that the combined property was to be left to the survivor during life and then to be disposed of by will for scientific or educational purposes, as had already been talked over *and agreed upon by them* in conversations between them, this disposition of all *their* estate being so made in consequence of their married life not having been blessed with children."

It should also be stated that by his will above referred to Mr. Avery bequeathed, among other legacies, a legacy of one thousand dollars to the appellees above named, who are the heirs of Mrs. Avery and are claiming the property in controversy as such heirs. The will also contained the following clause:

"These bequests are all made upon the condition that the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatees hereinafter named."

The residuary legatee is the Smithsonian Institution.

To establish its supposed title to this property the Smithsonian Institution on the 4th of June, 1895, filed the bill in this case. The bill avers the death of the testator, sets forth the conveyance by Sands to Mrs. Avery; avers the payment of the purchase-money by her husband and the circumstances under which the purchase was made and the deed executed, the material facts in regard to which are above set forth. The bill then in substance prays that the heirs be decreed to have forfeited the $1000 legacy "for breach of condition annexed to said legacy," and that the "equitable title" of the testator to the property in controversy be declared to be "by virtue of his will vested in the Smithsonian Institution."

The answer of the heirs of Mrs. Avery in substance denies that the testator had any interest, legal or equitable, in the said real estate, and asserts their claim to the property as such heirs and to the $1000 legacy.

Issue was joined, testimony was taken, and on the hearing before the Special Term the prayers of the bill were sustained, as set forth in the decree on page 56 of the Record.

From this decree all the defendants (except Julia Avery, the executrix, who is a mere formal defendant), appealed to the Court of Appeals of the District, where the decree below was reversed and the bill dismissed, Meech *vs.* Smithsonian Institution, 8 Court of Appeals D. C., 490. And from that decree the Smithsonian Institution has appealed to this court.

Mr. Justice Hagner of the Special Term before whom this case was first heard delivered an opinion in which he found in favor of the appellants, the Smithsonian Institution. The Court of Appeals in reversing that opinion said:

"We have no desire to dissent from the statement of the law by the learned justice who heard this case in the court below, as contained in his very able and elaborate opinion which we find in the Record; ***but we fail to find in the record the testimony which in our opinion is required to support it.***

Argument.

There are two controversies in this case and they involve respectively:

1st. The right of the appellant to the real estate described.

2d. The right of the appellee to the $1,000 legacy.

Each will be considered in its order.

I.

With respect to the real estate the bill may be considered either as a bill seeking (*a*) to establish a resulting trust or (*b*) as a bill to enforce ***a parol agreement to make a will*** devising the real estate in controversy. With respect to the latter proposition we submit that if ever the complainant's counsel really regarded the averments of the bill as calling for relief of that

nature he completely abandoned it when he came to offer his evidence. Not one syllable from the beginning to the end of the testimony supports the statement in the bill "that at the time of the purchase of this property by Mr. Avery it was expressly agreed by and between himself and his wife * * * that Mrs. Avery was to make her will giving the same to her husband."

But a single witness (Shidy, Rec. p. 39) testifies in regard to any agreement to make a will, and his testimony, indefinite and vague as it is, if it establishes anything, establishes an agreement to make "a will transferring it at her death to the Smithsonian Institute," whereas the averment of the bill, as we have seen, is that she agreed to make a will "giving the same to her husband." The complainant, of course, must prevail, if at all, *secundum allegata et probata;* but aside from that, this witness says in respect of his testimony:

"I do not pretend to give an exact verbal statement of what took place at the time, because these events occurred something like ten years ago, and my memory of them would not be vivid enough to give the precise words, but I am very confident in regard to the *tenor* of what was said and done at the time."

In McCormick *vs.* Hammersly, 1 Court of Appeals D. C., at p. 320, that court said that while under some circumstances an agreement by a wife with her husband to make a will might be enforced in equity, yet it intimated very strongly that the agreement must be "fully proved;" that he must establish "beyond a reasonable doubt the allegations of his bill." See also Semmes *vs.* Worthington, 38 Md., 298; Fordy *vs.* Williams, *id.* It is hardly necessary to further argue that in the case at bar neither the allegations of the bill nor the evidence offered come within speaking distance of such requirements.

Leaving, then, this aspect of the controversy, let us consider whether the bill or the proof offered to sustain it establishes a resulting trust in favor of the complainant.

II.

It is submitted that the very allegations of the bill itself negative the existence of a resulting trust. It sets up clearly and specifically *an express agreement* between the husband and wife that the wife should take the property for life, and in the event of surviving him that she would devise it to the Smithsonian Institution, but if she should die before him she would devise it to him. Of course this is not a resulting trust, but an *executory agreement*, which in the case of real estate must be established by evidence in writing "signed by the party to be charged," and even then under the circumstances of this case could not be enforced, for the appellant is a mere volunteer, and it is well settled that courts of equity will not enforce a contract in behalf of one from whom no consideration proceeded.

Fry Specf. Perf., § 92.

The Court of Appeals of this District has in three well-considered cases of comparatively recent date expressed its views upon the doctrine of resulting trusts. In Cohen *vs.* Cohen, 1 Court of Appeals, p. 240, it said:

"Where a purchaser takes the conveyance, not to a stranger, but to his wife, the presumption of a resulting trust that arises where the grantee is one for whom he is under no natural, moral, or legal obligation to provide is rebutted, and the contrary presumption arises that the purchase and conveyance was intended as a gift or advancement to the grantee.

"It is universally held that, while parole evidence will be received, all the facts necessary to establish the resulting trust must be proved with *clearness and certainty*, and they must not only be certain, but consistent with each other and the alleged intent of the parties. The necessity for clear and satisfactory proof is still stronger in a case like this, *where the transaction is an old one, the wife dead*, and her heirs-at-law helpless children."

Similar views were expressed by it in Cooksey *vs.* Bryan, 2 Ct. of App. D. C., 557; McCormick *vs.* Hammersly, 4 Ct. of App., 320; and in Levis *vs.* Kengla, 8 Ct. of App. D. C., 230, this court said:

"The trust sought to be raised is not the resulting trust that is expressly reserved from the operation of the statute by the terms of the statute itself. That resulting trust is one arising by implication or construction of law. The trust here alleged is an *express* trust created by express agreement to that effect by the parties themselves. If the statute may be avoided or evaded by designating an agreement as a trust, it is difficult to see wherein it can be enforced at all."

In Jackson *vs.* Jackson, 91 U. S., 125, a case where a husband sought to establish a resulting trust as to property standing in his wife's name, Mr. Justice Field delivering the opinion of the Court said:

"But no presumption that a personal benefit was intended to the party advancing the funds for a purchase in the name of another can arise where an obligation exists on his part, legal or moral, to provide for the grantee as in the case of *a husband for his wife* or a father for his child. The circumstance that the grantee stands in one of these relations to the party is of itself sufficient evidence to rebut the presumption of a resulting trust, and to create a contrary presumption of an advancement for the grantee's benefit."

The fundamental error committed by Mr. Justice Hagner in his opinion which was reversed by the Court of Appeals, was in failing to recognize with sufficient accuracy the technical limitations which surround resulting trusts and confine them to certain well-defined facts.

A resulting trust in real estate *ex vi termini* is a trust which results *back* to the creator of the trust, and is for his benefit *solely* and not for the benefit of some third party. It is created not by the *agreement* of the parties (for then it is an *express* trust), but arises and grows out of the existence of certain facts entirely independent of agreement. One of the few cases in which it can arise in respect of real estate is where the consideration or purchase price for the property is furnished by one person and the title is taken by another, there being an entire absence of any *agreement* with respect to

the manner in which the title is to be held, for if there be an agreement as to the holding of the title, then the transaction is *controlled* by that agreement, but if there be no agreement, then the law steps in and controls it and declares that a trust arises for the benefit of the person from whom the consideration proceeded and that the person in whom the legal title is vested shall hold it in trust for the former. This is the only way in which a resulting trust can operate, viz., for the sole benefit of the party from whom the consideration proceeded. It cannot operate so that any other or third person shall become the beneficiary or *cestui que trust.* (1 Perry on Trusts, §§ 133, 134; Jackson *vs.* Ringland, 4 Watts & Sargt., 149; Thompson *vs.* Thompson, 180 Ohio St., 73; Bottsford *vs.* Burr, 2 Johns. Ch., 408; Lothrop *vs.* Hoyt, 7 Barb., 60; Dorsey *vs.* Reading, 8 Sargt. & R., 484.) Now, in the case at bar we have a transaction in which it is claimed that Mr. Avery paid the purchase-money,* but the legal title was taken by Mrs. Avery, and the trust which it is said arose from this transaction is *not* that Mr. Avery became *immediately* entitled to the beneficial interest, but that Mrs. Avery thereby became entitled to enjoy the property *for her life,* and in case she survived her husband it was to go upon her death to the Smithsonian Institute, and if she did not survive him, then it was to go to him for his *life,* and on his death to the Smithsonian Institute in fee. Such a trust could, of course, arise only by an agreement evidenced by a writing signed by the party to be charged. It has no more likeness to a "resulting trust" than a bill in equity has to an indictment for petty larceny. In a resulting trust there are no qualifications of the estate to be held by the parties. A, who pays the purchase-money, takes the same estate in equity that B, the legal grantee, takes at law. The law does not declare that if A pays the purchase-money and the legal title is taken by B

*The proof that Mr. Avery paid the purchase-money the Court of Appeals very correctly said was not "by any means satisfactorily proved." (Rec. 74.)

the latter shall hold the estate *for his life* and then on his death A shall take it. A must take the beneficial use *eo instante* the legal title vests in B. (1 Perry on Trusts, § 133.) That is the *only* trust that the law creates by reason of the facts. If any other conditions are attached to the trust it must be by the agreement of the parties; whereupon *ipso facto* it is not a resulting trust, but an executory contract.

It is clearly evident, therefore, that the trust which, it is contended in the case at bar, exists for the benefit of the Smithsonian Institution cannot be established except by evidence in writing signed by Mrs. ery, and it is not contended that there is any such eviden n this case.

We insert here a few tations which, we submit, amply sustain the foregoing propositions:

"Under section 7 of the statute of frauds declarations of trust or confidence, if proved by verbal evidence only, are utterly void and of no effect; but a trust which arises by operation of law, *independently of any declaration whatever*, viz., a resulting trust; is expressly excepted from the operation of the statute by section 8 thereof." (Bish. Equity 97; Groff *vs.* Rohrer, 35 Md.)

"The courts look with dislike upon receiving proof of trust by parole, and have reluctantly adopted the rule in equity. They receive the evidence with *great hesitation* and consider it most unsatisfactory and will not admit it where there has been lapse of time by death [in the case at bar *both* the parties are dead], or if it is loose and ambiguous, and it will be received only to show *facts* from which the law, *without any declarations of trust or agreement of the parties*, implies a trust. It is to be received with caution, and must be evidence *so strong* as would induce a chancellor to decree a conveyance, and *loose evidence of conversations is insufficient.*" (Reed on Stat. of Fr. sec. 974 *et seq.*; Cohen *vs.* Cohen, 1 Court of Appeals D. C., 240; Cooksey *vs.* Bryan, 2 Court of Appeals D. C., 557; Levis *vs.* Kengla, 8 Court of Appeals D. C., 230.)

The only evidence in the record is that of "loose conversations" held with an old lady whom one of the witnesses for the appellee swore he believed to be *mentally* unbalanced, and

he says he was "in a position to know." Her talk was "random talk." "I should not consider such a person responsible for half she *said* or did." (Rec. p. 38.)

"The attempt to create and to enforce a specific trust, from the loose and equivocal expressions of the parties made at different times and upon different occasions, would be inconsistent, not only with the spirit and policy of the statute of frauds, but with the general rules of evidence." (Slocum & Wife *vs.* Marshall, 2 Wash. C. C., 308; Thomas *vs.* Standiford, 49 Md., 181.)

"While the transaction out of which a resulting trust arises may be proved by parol, the trust itself must rest upon the acts and situation of the parties as proved, and not merely upon their declarations." (1 Beach Eq. Jur., § 223; Foote *vs.* Bryant, 47 N. Y., 544.)

"The possession of the estate and receipt of the rents will not rebut the presumption [that the conveyance was a gift by husband or father] nor disbursements in repairs on the estate and the like." (1 Beach Eq. Jur., sec. 222 and authorities cited, and see sec. 224.)

In the face of this well-settled proposition as to rents and disbursements, Mr. Justice Hagner in his opinion, which was reversed by the Court of Appels, alludes to the fact (Rec. p. 64) that the husband collected the rents as tending to sustain the appellee's contention of a resulting trust. We had always supposed that the husband, as agent of the wife, almost always collected the rents of his wife's property, but never supposed it could be used as a fact to assist him or third parties in depriving the wife of her estate therein.

Moreover, the learned justice seemed to have forgotten his own (although incorrect) statement (Rec. p. 62) of Shidy's testimony, viz., that the conveyance was "upon the *avowed agreement* that it was to be enjoyed by her only as *tenant for her life* and only if she should survive her husband, and should be received by the Smithsonian Institution immediately upon the death of the survivor for the scientific objects that both so earnestly desired to foster." So that the fact that the wife

allowed her husband to collect the income of an estate which he admitted was hers during her life tends to prove "the true intention of the parties" (Rec. p. 63), viz., that the Smithsonian Institution was to become the final beneficiary of the property! Could fallacious reasoning go further than this?

"Nor will the payment of taxes and the making of improvements by the husband rebut the presumption that the conveyance was a gift to the wife." (Maxwell *vs.* Maxwell, 109, Ill., 588.)

So, again, the learned judge of the special term relied largely on what he conceived to have been in evidence, viz., declarations by the wife that she held the property in trust, while in point of fact there is not an iota of such evidence, the learned counsel for the appellant is challenged to point to any evidence containing such a declaration. Mrs. Bumpus says "she always said it was her property," and Mrs. Bradley says "she always spoke of it as 'my' house. Every time I met her, I do not think I met her that she did not say something about 'my' house." Both of these are plaintiff's witnesses. Yet, even if there were such declarations, all the authorities say:

"Mere declarations of the trustee [the wife] are not sufficient to establish a resulting trust. Such evidence is unsatisfactory from the danger of mistake and may easily be misinterpreted unless corroborated by circumstances." (Reed St. of Fr., § 976.)

The language of the *tenendum* is "unto and to the *only* use and benefit of said Lydia Tyler Avery, her heirs and assigns."

"Nor can a resulting trust arise where the *use* is expressly limited to the grantee in a deed." (Am. Encyl. Law, vol. 10, p. 14.)

"In these cases there can be no implied trust, for the grantor by expressly declaring the trusts [*i. e.* the use] upon which the deed is made leaving nothing to implication." (1 Perry on Trusts, § 162; Donley *vs.* Bradley, 119, Ill., 412; Alexander *vs.* Warrance, 17 Mo., 228; Dean *vs.* Dean, 6 Conn., 285.)

It is said, however, that this rule only applies as between grantor and grantee; that where a third party pays the purchase-money he is not estopped by the recital of the grantor's deed, but it may well be doubted, whatever may be the rule otherwise, whether as between husband and wife, where the husband is cognizant of the language of such a deed, he can afterwards contradict it by parol. In the case at bar it is in evidence that Mr. Avery himself received the deed and it must be presumed that he read it, and if he read it he saw that the conveyance was "unto and to the *only* use and benefit of said Lydia Tyler Avery, her heirs and assigns."

It is also a serious question whether when a husband purchases property in the name of his wife a resulting trust arises. Washburn Real Prop., Vol. 2, p. 475, says there cannot be "for the reason that a wife cannot be a trustee for her husband;" and Story says "the presumption [of an advancement] is stronger *in the case of a wife* than of a child, for she cannot at law be a trustee for her husband" (Story Eq. Jur., § 1204). The language of the Supreme Court of the United States, in Jackson *vs.* Jackson, 91 U. S., 122, would seem to be of similar import. But while it is conceded that parol proof has been held admissible to rebut the strong presumption of an advancement in cases where the deed is an ordinary feoffment, yet we insist that in case of a purchase by a husband in the name of the wife, where the deed expressly and with the knowledge of the husband limits the use "unto and to the only use and benefit" of the wife, the evidence necessary to overcome such presumption, even if it can be by parol proof, must be very strong, indeed.

The most that is claimed for the evidence in this case is that Mrs. Avery, at some time or other, declared that her husband furnished the money to purchase this property and that she *intended* to give it to the Smithsonian Institution on her and his death; but many people have *intended* to make a will and then died without doing so.

"If a husband conveys his lands to his wife upon the express trust to enable her to better manage and preserve his estate and to be applied by her in accordance with the provisions of his will before made and she agrees to carry out the trust, the same will fall within the statute of frauds if not created or evidenced in writing, and cannot be enforced if the defense of the statute be interposed." (Scott *vs.* Harris, 113 Ill., 448.)

Upon even stronger facts the courts have used the following language:

"The only evidence introduced in the case to establish a [resulting] trust was that of declarations made by the wife to the effect that the property *belonged* to her husband, and that she would convey it back to him whenever he wished her to do so. *These were declarations of an express trust* which could only have been proved by writing." (Price *vs.* Keen, 112 Mo., 412–419; Woolford *vs.* Stephens, 51 Mo., 443.)

"A mere admission in writing that parole promises to hold the land in trust were made at the time of the conveyance is not enough to give life to the trust." (1 Perry on Trusts, sec. 79.)

"The presumption arising from the conveyance, that it fully speaks the whole truth, must prevail until the contrary is established beyond reasonable controversy. The burden of removing this presumption rests upon the party asserting the contrary, and it is not enough for him to *generate doubt and uncertainty*." (Lehman *vs.* Lewis, 62 Ala., 129.)

"The burden rests *heavily* upon the plaintiff to establish against the record a passive trust resulting by operation of law from the payment of one person of the consideration of a deed taken in the name of another." (Whitman *vs.* Learned. 70 Me., 276.)

A fortiori would the burden be a heavy one when the conveyance is to the wife and the deed expresses it to be "to her only use and benefit."

In Lee *vs.* Browder, 51 Ala., 288, the admission of parole evidence to establish a resulting trust was called "one of the mistakes of equity.

The American Encyclopedia of Law, Vol. 10, p. 29, has collected some of the expressions used by the courts when defin-

ing the character of the evidence necessary to establish a resulting trust: "It should be very clear and received with great caution;" "clear and distinct or explicit;" "clear and satisfactory;" "not only satisfactory, but clear and undoubted;" "unquestionable;" "clearly sufficient;" "full, clear and convincing;" "most convincing and irrefragable."

The Act of 29th Charles II. is in force in the District of Columbia. (Williams *vs.* Morris, 5 Otto 444; Compiled Stats. D. C. 231.)

We shall now present an analysis of the testimony in the case at bar and we shall see how completely it fails to come up to the requirements of these expressions.

The Evidence.

All the witnesses are those of the appellants. The appellees offered no oral testimony. The only evidence offered by them was a statement of Mrs. Avery's account with the Norwich Connecticut Savings Society (Rec. p. 55), showing her to have had considerable money of her own at one time (nearly $2,000). What became of it if a portion of it did not go directly or indirectly into this property? At all events, it contradicts one of the witnesses, who said that Mrs. Avery never had any means of her own.

GEORGE HAZLETON: "Sands was the owner of the property and wanted to sell it. He was a client of mine. I drew up the deed at the request of Mr. Sands and Mr. Avery. I will not say of his wife, for she *may* have expressed herself at the time as to something about it, but at their request I drew up the deed [that is, at the request of *Mrs.* Avery as well as of her husband]. I drew the deed up to her. The price and everything of course were agreed upon. Then a day or two after that they came back with the money, and Mr. Avery delivered the money on my table and it was counted there, and they took the deed and went away."

"Q. What part, if any, did Mr. Mrs. Avery take in the business transaction?

"A. Well, there was no dispute between them as to what was to be done. It was directed [it is not said *by whom*] that the deed be made to her, and there *seemed* to be an understanding between them that that was the way the deed should go.

* * * * * * *

"Q. Was anything said by her?

"A. It has been a long time ago. *I could not tell what was said*, but he paid the money over, and there seemed to be an understanding between them that it was all right, and that is all I could tell."

This is the only witness to the circumstances of the execution of the deed, and it is too clear for argument that not one word of this testimony points to any such arrangement as is claimed by the appellant. It is simply the case of a man paying money (without showing whose money*) and the deed being made out in the wife's name. In other words, Mr. Hazleton's testimony proves absolutely nothing to support the appellant's contention that it was the intention of the husband that the wife should take the property *sub modo* only.

LORENZO D. BUMPUS (Rec. 23) testifies to the leasing of the property to him by Mr. Avery on the 1st day of October, 1887, which was more than two years and a half after the execution of the deed. "Mrs. Avery did the bulk of the talking, but Mr. Avery did the business. She would say, 'You keep still, Mr. Avery; I want to talk.' He paid the rent to Mr. Avery, but Mrs. Avery was always present."

* * * * * * *

"Q. Did you have any conversation with Mrs. Avery with respect to whom this property should go after her death?

"A. Repeatedly.

"Q. State what was said.

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*The Court of Appeals said it would assume for the purposes of the case that the husband paid the purchase money "although we do not by any means regard it as satisfactorily proved." Meech *vs.* Smithsonian Institution, 8 Court of Appeals, D. C. p. 507. (Rec. p. 74.)

"A. She told me repeatedly that Mr. Avery and she *proposed* to leave whatever *they* had at their death to the Smithsonian Institute to establish an 'Avery fund' in the interest of science, and that whichever one died first the other one was to carry out the wishes of the two—that everything *they* had was to be left to the Smithsonian Institute."

Again, we have nothing from this witness to establish the trust claimed. The utmost that can be said of his testimony is that Mr. Avery and she *proposed* to make a will devising "whatever they had" to the Smithsonian; but that the property in question was conveyed to her on such condition nowhere appears. Many people, as we have said, purpose to make a will, but die without doing so.

ALICE L. BUMPUS (Rec. 26) is the wife of the preceeding witness. Her testimony proves the appellees' case; thus:

"She (Mrs. Avery) used to say that it was Mr. Avery's money; that he had earned the money, *and she claimed the property he had bought.*"

"She said that Mr. Avery had bought the property and told her *she could have it*, and she *always* said to me that it was *her property*.

"Q. Did she say anything about what was to become of the property after they died?

"A. Well, she said over to our house *once* that when they were through with it they *wished* it to go to the Smithsonian Institute."

Every word of this witness' testimony, it will be seen, is in direct contradiction of the case presented by the bill.

JOHN F. COX (Rec. 27). This witness testifies that he is an attorney-at-law; that he was professionally engaged as Mr. and Mrs. Avery's attorney to draw up a will for them; that in consequence of his *professional relation* with them he had a number of conversations with each upon the subject of the disposition of their property by will; that at these conversations certain statements were made by Mr. and Mrs. Avery, to which statements he undertakes to testify.

Of course the appellees objected and still object to these disclosures by an attorney of matters learned by him of his clients by reason of his professional relationship. They cannot be received as evidence. (See authorities cited elsewhere in this brief upon this point.)

But even if they were admitted they prove nothing to sustain the appellant's case. Not a word of his entire testimony goes to show that at the time of the execution of the deed and the taking of title by Mrs. Avery there was any agreement or understanding that she was to hold it simply in trust. It is true the witness gives his *opinion* about it, saying "she *regarded* this property that she held only in trust, *as it were*" (*sic*). Of course the witness could only say what she *said* and not what she "regarded."

The witness drew up an affidavit for Mr. Avery after Mrs. Avery's death. What Mr. Avery said *after* his wife's death as to the conditions upon which the title was put in her name, it is scarcely necessary to say, would not be evidence of anything *for* the appellant, but it would be evidence *against* it. The language of the affidavit forcibly and directly rebuts any idea of a resulting trust; if it proves anything it was an express trust. He says:

"He permitted said property to be transferred to her upon the *expressed* condition that she was to make a will in his favor in the event of his surviving her."

But on page 32 the witness negatives the entire case of the appellant so far as it is sought to prove declarations of Mrs. Avery as to the existence of any trust. He says:

"I do not recall that she [Mrs. Avery] ever stated to me that there was an arrangement or an agreement conditional on her taking the property."

HARMON M. BRUSH (Rec. 36) testifies that all he knows about the case is that when the $600 note was due Mr. Avery called

upon him and paid it. He says he had no conversation with Mrs. Avery at all; that he did not regard her mentally as responsible; that he considered her "off her balance and not capable of doing business. I always looked upon her as being half crazy."

"Q. You thought she was mentally unbalanced?
"A. *I did, and I was in a position to know.*"

This, be it remembered, is the appellant's own witness.

LELAND P. SHIDY (Rec. 39): This is the *one* witness whom the appellant relies upon as overcoming the sworn denials of the answer. He admits that the matters he is testifying occurred over ten years ago and that he can only give the *tenor* of the various conversations he had at different times with Mr. and Mrs. Avery. He says he was quite intimate with them. He used often to spend his evenings with them, and had frequent conversations with them about their property. "Some of the conversations took place before and some after the purchase" (p. 45), but he cannot tell which occurred before and which after the conveyance. He can only give his "conclusions" from the conversations they had (p. 45). "I do not pretend to give an exact verbal statement of what took place, because these events occurred something like *ten* years ago, and my memory of them would not be vivid enough to give the precise words, but I am very confident in regard to the *tenor* of what was said and done at the time" (p. 46).

Now, the witness, having testified that he could give only the tenor of these conversations had ten years previously, proceeds to give the "tenor" of them. It is plain that such testimony is not admissible to prove a resulting trust or a trust of any sort in land, which by all the authorities must be established by "strong, clear, and convincing evidence."

But here is what he gives as his *conclusions*, after ten years, as to what the *tenor* of the conversations were between himself and Mr. and Mrs. Avery:

"She wanted it in her name, in the first place, because she wanted to have *control* of that property, as it was immediately contiguous to her own house, and then she thought she would be pretty certain to outlive her husband, and that it would be better in case of his death to have the *title in her name.*"

"Q. State what final disposition, if any, was agreed upon by these two persons in your presence.

"A. It was *agreed* that she should have the property during her lifetime, and that she should make a will transferring it at her death to the Smithsonian Institute."

When this agreement took place, whether before or after the conveyances, and in what words it was expressed, the witness distinctly disclaims being able to state.

Of course, even if this witness' statement of the *tenor* of a conversation had ten years previously between two persons, both of whom are dead, could have any weight as evidence, it would not establish the averments of the bill. The witness does not state any *agreement* on the part of Mrs. Avery to will it to her husband at her death, but to the Smithsonian Institution, who is a mere volunteer; "from whom no consideration proceeded." and for whom courts therefore never enforce agreements (Fry Specif. Perf., §§ 92, 819); nor promises founded solely on benevolent intentions (Mercer *vs.* Stark, 12 Am. Dec., 583; Owings' Case, 1 Bland's Ch., 370). Moreover, the alleged agreement is directly in the teeth of the statute of frauds as to express trusts; and, more than all, Shidy is the *only witness* who in the face of the denials of the answer testifies to any *agreement* whatever or to any expressed intention of Mr. or Mrs. Avery prior to or at the time of the execution of the deed, if, indeed, it can be said, (in view of his statement that he cannot say *when* any particular conversation took place, whether before or after the conveyance,) that *this* particular conversation occurred before the execution of the deed. All the other witnesses testify to chance expressions in conversations had long *after* the conveyance. It is, of course, settled that the denials of the answer must be contradicted by at least two witnesses

or one witness and corroberating circumstances. As Mr. Shidy's testimony is the only testimony which can be said to be (if it amounts to anything) in contradiction of the denials of the answer, it follows that it has no probative force, for the only testimony that could corroberate him if at all, is testimony which is inadmissible under the rule which forbids evidence of conversations had or statements made after the conveyance of the property.

There is but one remaining witness, JULIA C. BRADLEY.

The testimony of this witness completely overthrows the appellant's case. She says Mrs. Avery always spoke of it as her house. "Every time I met her; I do not think I met her that she did not say something about 'my house.'"

I believe I have given a fair synopsis of the appellant's evidence, taking up witness by witness. How in the world it can be said that it establishes a trust in this property passes my comprehension. If the rules of evidence, as taught in the law schools and in the text-books and announced by the courts, amount to anything, the facts set up in the bill as a ground of relief, so far from being proved, have been completely disproved by the complainant's own witnesses. The appellees needed no witness; their case was made out for them by the complainant itself. Giving to the testimony the most strained and favorable inferences in behalf of the appellants, the very utmost that can be said of it is that it presents a case very like those of Edgerly *vs.* Edgerly, 112 Mass., 175, and Lane *vs.* Lane, 80 Maine, 570. In the latter case the court said (p. 578), referring to the Massachusetts case:

"The case is much like that of Edgerly *vs.* Edgerly, 112 Mass., 175, where the court said: 'The only reasonable inference from all the facts proved is that while the husband did not intend to make a gift of the property to his wife which would deprive him of all benefits thereof, he did intend that the use

of the estate and the application of the income should rest in her discretion. So here the wife was, in any view, no more than a *discretionary* trustee, with the legal right to do with the property as she pleased, only that, under our statutes, she could not convey it in his lifetime without his joinder in her conveyance."

But on the whole case it is submitted—

1st. That there is no such testimony in this case as the law requires to overcome the sworn denial in the answer that Mr. Avery did not pay the purchase money.

2d. Nor the sworn denial that Mrs. Avery took the property in trust.

3rd. On the contrary the evidence of the plaintiff's own witnesses establishes clearly that Mrs. Avery always claimed this property as hers absolutely, and never at any time declared that it was conveyed to her upon any condition whatsoever.

Confidential Communications Between Counsel and Client.

Admissibility of the Evidence of the Witness Cox.

"In a case where an attorney was regarded as attorney for both husband and wife, he was not allowed to testify as to a conversation had with the wife, it being of a professional character."

Weeks on Attorneys, p. 270.
Scranton *vs.* Stewart, 52 Ind., 68.
Scott *vs.* Harris, 113 Ill., 440.

"The seal which the law once fixes upon such communications remains forever, unless removed by the party himself in whose favor it was there placed; and where the privilege belongs to *several* clients it is said no one of them, nor even a majority, contrary to the expressed will of the others, can waive the privilege so as to legally justify the attorney in giving testimony in relation to such privileged communications."

Weeks on Attorneys, p. 265.

Within the scope of the professional employment of an attorney the communications made to him by his client are privileged, and without the consent of the latter he should neither be required nor permitted by the courts of the United States to testify concerning them (Conn. Mut. Ins. Co. *vs.* Schaefer, 94 U. S., 457). See the emphatic language of Justice Bradley in that case, in which he says: "The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy."

The Thousand-Dollar Legacy.

Mr. Justice Hagner in his opinion in this case (p. 66) says:

"The conduct of the defendants in this respect has a wider effect than the mere forfeiture of the legacy. Their acts set in operation the law governing the principle of *election* which must apply to every person whom a will proposes in any particular to benefit. The defendants, with full knowledge of all the facts, are claiming the legacy of $1,000 given them by the will as free from all conditions, while they dispute the devise of the A-street lot, made by the same instrument to the complainant. This is at variance with the established rule that one cannot be allowed to claim under a will and against it."

The courts, it is true, have held that if A gives a legacy to B and in the same instrument devises *B's property* to C, B must elect whether he will accept the legacy and permit the devise to take effect, or reject the legacy and refuse to allow C to have the property. But the appellants insist that the testator has not devised *our* property. How, then, can the doctrine of *election* apply? If we elect to take the property we are told it is not ours to take. If we elect to take the legacy we are told we cannot have it, because we claimed the property. The more logical contention of the appellees is that they have never had an election put to them to take either the legacy or the A-street property, and they cannot, without a surrender by the appellant of its contention in regard to its ownership, have such an

election put to them. There is therefore no room whatever for any application to the case of the doctrine of election. It is perfectly clear that the testator never intended that we should make an election between taking the property or the legacy. He regarded the property as his, not ours, and supposed it would pass by his will. He never claimed to be devising our property. He had a right to devise our property and give us a legacy in lieu thereof, *if he so intended*, and the devise is good if we elect to accept the legacy. The question is, Did he intend to do so and to put us to an election? To put this question is not to dispute the will, but to ask, *probabilis causa litigandi*, for its construction. It is also a question directed to the ascertainment of a fact which cannot be ascertained from the face of the will itself, and therefrom to ascertain the intent of the testator, for if the testator believed this to be his property he could not have intended that we should be put to an election.

"The intention to raise an election must be clear and manifest from the will itself. The intention must be collected from the face of the instrument, and without a clear and express manifestation it cannot be presumed to extend to property which did not pass under the will."

Jones *vs.* Jones, 8 Gill, 198.
In re Gilmore, 81 Cal., 242.

Moreover, the appellant's claim that the terms of the will are such as to create a forfeiture of this $1,000 in case the legatees "dispute" the will is met by the well-settled doctrine that all forfeitures are to be strictly construed. It is submitted, therefore, that the testator's language in this particular must be taken in its strictest sense to mean "disputing" *the whole will in the manner wills are usually disputed, viz., by caveat.* The appellees are not disputing the whole will; indeed, they are not disputing any part of it. They concede it to be the will of the testator. They permitted it to be probated and ask that it be enforced. They do, however, dispute the claim of

the appellant that the testator ever intended to devise *our* property to it. He supposed he was devising his own and now that it turns out not to be his of course it does not pass.

It also seems to be the result of the authorities that if there exists *probabilis causa litigandi* the non-observance of the condition not to dispute a will, will not cause a forfeiture.

29 Am. Encyl. Law, 484, *note*, Jarman on Wills.
Roper on Legacies, Vol. 1, p. 795.

The language of the Court of Appeals as expressed in its opinion as to this question seems to clearly state the law. It said:

"With reference to the legacy of $1,000 given to the appellants by the testator, Robert S. Avery, and which is sought to be forfeited in this proceeding on account of the alleged disputing of the will by the appellants [the appellees here] it is not seriously controverted by the appellees [appellant] that the decree of the court below in that regard must be modified. Forfeiture is not greatly favored in equity under any circumstances; and this case is not one for the enforcement of a forfeiture. It may be suspected that the claim of the appellants [the heirs of Mrs. Avery] to the property in dispute was the very thing against which the testator was solicitous to guard; but clearer and more unequivocal language for that purpose should have been used to justify a court of equity in decreeing a forfeiture in this case. *Claiming property which it is contended did not pass under the will, cannot in any proper legal sense be regarded as a disputing of the will.*"

Appellant's Brief.

Since the writing of the foregoing the appellant's brief has been handed us. A point not made by appellant's counsel in the court below now appears for the first time in his brief in this court, viz., that appellees have not denied the allegation in the bill of an express agreement, and therefore cannot take advantage of the statute of frauds, since they have not set it up. In reply we have to say that even if this contention may now

for the first time be considered, it applies, if at all, only to cases *between the parties to the original contract.* Thus, where A sues B, and sets forth B's alleged parol argreement, B, of course, must know whether he made such an agreement or not, and, if he did not make it, can make denial, which denial, under the rule laid down in May *vs.* Sloan, 101 U. S. 231, and Dunphy *vs.* Ryan, 116 U. S. 496, lets in the defense under the Statute of Frauds. But it is plain that a defendant not a party to the contract may have no knowledge of it whatever, not even enough upon which to base a belief as to whether it was or was not made. This is the case at bar, Mr. and Mrs. Avery resided in Washington, where the contract is alleged to have been made. The appellees resided in Connecticut and never heard of such an agreement until it was first alleged, more than ten years after it is said to have been made. All that they can swear to in such a case is to aver a want of knowledge and require strict proof of the alleged contract if it be *relevant.* This the defendants have done and the plaintiff having undertaken to make proof of the alleged contract has failed utterly to do so. The case in this particular as to lack of evidence is very much like that of May *vs.* Sloan, *supra.*

In that case Mr. Justice Bradley, speaking for this court, said:

"The object of this suit is to compel Asa May to convey to Sloan, the complainant, the Alvan May place according to what he alleges was the agreement and understanding between the parties, and the intent and meaning of the last clause in the agreement of January 5th, 1874. * * * Had the complainant succeeded in proving such an agreement it could not have availed him. *But the fact is he did not succeed in making such proof.* The evidence is conflicting on this subject. We have only that of the complainant himself, in which he is contradicted by the defendant and by Alvin May and by Pasco the attorney."

In the case at bar we have no "conflict" of testimony. The evidence is all one way (and established, moreover, by the complainant's own witnesses) that Mrs. Avery, so far from

making the alleged agreement always asserted the property to be hers, and not her husband's.

It is to be observed also, that this plaintiff does not allege in this bill specifically and in terms, that the contract was in parol, it alleges an express agreement—"it was expressly agreed" it is said—and from anything that appears in the bill it may be that a written agreement was meant, especially as it was in regard to real estate. The defendants not knowing what was meant, say in their answer that they have no knowledge of "any understanding or agreement, verbal or *otherwise* * * *" but if the alleged fact be true and relevant [and to be relevant it must be in *writing*] they require strict proof thereof." Thus giving notice that the contract, agreement or understanding is *not admitted*, which is the same in effect (upon the plaintiff's obligation to prove it) as if it were denied.

But, aside from all these considerations, the contract which the plaintiff sets up has its foundation in the alleged payment of the purchase-money by Mr. Avery, *This is expressly denied* by the defendants, and, hence the contract is denied.

But whether denied or not, the complainant was called upon to prove it, and, as we have seen, instead of doing so he has established affirmatively that it was Mrs. Avery's property and not the husband's.

We do not deem it necessary to take up the other points sought to be made in the elaborate brief of counsel for the appellant. They are all based upon the assumed existence of a fact which does not exist, to wit, the *contract*.

FRANKLIN H. MACKEY,
Solicitor for Appellees.

SMITHSONIAN INSTITUTION *v.* MEECH.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 191. Argued January 12, 1898. — Decided February 28, 1898.

In the District of Columbia it is the rule that when, upon a purchase of real estate the conveyance of the legal title is to one person while the consideration is paid by another, an implied or resulting trust arises, which may be shown by parol proof; and the grantee in the conveyance will be held, on such evidence, as trustee for the party from whom the consideration proceeds, whose rights will be enforced as against those claiming under the record title.

Statement of the Case.

This case comes within that rule, the evidence being clear and satisfactory that the oral agreement made between Mr. and Mrs. Avery, at the time when the property was conveyed to the latter, was made as asserted by the Smithsonian Institution.

Such being established as the fact, it is the duty of a court of equity to recognize that agreement as against the legal effect of the conveyance to Mrs. Avery.

The presumption that when the consideration for a deed is paid by a husband, and the conveyance is made to his wife, the conveyance is intended for her benefit, is one of fact which can be overthrown by proof of the real intent of the parties.

When a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, no legatee can, without compliance with that condition, receive his bounty, or be put in a position to use it in an effort to thwart his expressed purposes.

On June 4, 1895, the appellant, as plaintiff, filed its bill in the Supreme Court of the District of Columbia to enforce certain rights claimed under a will made by Robert S. Avery, on July 22, 1893. In this will, after sundry bequests to his own relatives, is the following:

"I bequeath to the sister and brothers of my late wife one thousand dollars (1000) to be equally divided between them. I have already given these last over a thousand dollars which my wife inherited from her father, also clothing and other gifts, thus equalizing substantially my gifts to her family and to mine. These bequests are all made upon the condition that the legatees acquiesce in this will and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named.

"All the rest and residue of my estate, of whatsoever nature, real, personal or mixed and wheresoever situate, I hereby give, devise and bequeath unto the Smithsonian Institute, a body corporate by virtue of the laws of the United States, of which institution Samuel P. Langley is now secretary, having its legal residence in the District of Columbia, unto it and its successors forever.

"Having always had a love for the sciences, and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded that

the residuary gift above made to the Smithsonian Institution will best express my interest in science. As my labors have been directed to the invention and use of phonetic type, I desire, but do not require, that the income derived by the Smithsonian Institution from this gift may be applied, so far as it may determine, to promoting publications in such type of scientific publication, especially of such publications as may relate to phonetic type and printing. I also desire, but by no means require, that such part of said income as the said institution shall determine shall be applied to the publication of lectures and treatises upon and concerning those mechanical laws governing an ethereal medium which are treated of in atomic chemistry, and which are supposed to govern phenomena of electricity, magnetism, light and heat. Prizes might be given for essays on these subjects and upon such other kindred subjects as may meet the approval of the institution. I would like, however, to have published first the multiplying table and also IV-plate logarithms, publication of the table of squares, cubes, square roots, cube roots, reciprocals, prime numbers and factors, some of which I have written out. If the institution shall approve, the fund derived from the residuary bequest shall be called 'the Avery fund' or 'the fund contributed by Robert S. Avery and his wife Lydia T. Avery, for the extension of the sciences,' and all publications made from the fund shall bear this inscription.

"The property known as part of lot 2 (two) in square 787 in the city of Washington, D.C., being premises No. 326 A street S.E., is my property, although the title stands in my wife's name. I include it in the residuary bequest to the Smithsonian Institution."

The testator died childless on September 12, 1894. The will was probated February 2, 1895. He and his wife had lived for many years in Washington, he being in the employ of the Government in the Coast Survey Office. During these years he lived a quiet and retired life, devoting himself to scientific research, and experimenting chiefly in the matter of phonetic type. His wife was younger than he, and was, until shortly before her death, on November 18, 1890, in apparently

good health. While they were both living, and on April 20, 1885, the real estate described in the last paragraph quoted from the will was purchased, the title being conveyed to Mrs. Avery.

The bill alleged that the lot was paid for with the money of Robert Avery; that the title was taken in the name of Mrs. Avery because it was supposed that she would outlive her husband and upon an understanding and agreement that the property should, after their deaths, pass to the Smithsonian Institution in pursuance of a mutual desire to make their gift to this institution as large as possible; that notwithstanding these facts the defendants, other than the executrix, claimed title to the property as the heirs of Mrs. Avery, and had demanded possession. The prayer was for a finding and decree that the equitable title was in Robert Avery, and passed to the plaintiff by his last will; that the defendants be enjoined from claiming any title thereto, and that the executrix be directed to treat the thousand dollars bequeathed to the sister and brothers as forfeited for breach of condition annexed to said legacy, and as having fallen into the residuum. After answer, testimony was taken and the case was heard before Justice Hagner of the Supreme Court, who rendered a decree in accordance with the prayer of the bill, so far as respects the lot, but denying the relief sought as to the legacy on condition of the defendants executing a release of all claims to the realty. On appeal by all of the defendants, except the executrix, the Court of Appeals reversed the decree of the Supreme Court and remanded the case with directions to dismiss the bill. 8 App. D. C. 490. Whereupon the plaintiff appealed to this court.

Mr. Frank W. Hackett for appellant.

Mr. Franklin H. Mackey for appellees.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The legal title to this property passed by the conveyance

in 1885 to Mrs. Avery. She died without will. *Prima facie*, therefore, the title then passed to her heirs, the appellees. The plaintiff insists that in fact the purchase price was paid by Mr. Avery and paid under an oral agreement, whereby a resulting trust was created which changed the course of the title, and the first questions are, whose money paid for the lot, and was there such an agreement, and, if so, what were its terms?

That the money which was used in making payment for the lot was the money of Mr. Avery, is not seriously questioned. Both Mr. and Mrs. Avery lived very economically, and this money was accumulated out of savings from the salary he received from the Government. At the time of their marriage Mrs. Avery had a small amount of money on deposit in a savings bank in Connecticut, and the books of the bank showed that no part of that amount was drawn out at or near the time of this conveyance. Her repeated declarations were to the same effect, and that Mr. Avery's money had paid for the property.

The trial court also found that there was an oral agreement — an agreement made at the time the property was conveyed to Mrs. Avery, that she should hold the property during her lifetime, and that she should make a will by which it should pass at her death to the Smithsonian Institution. The Court of Appeals held that the testimony did not establish the alleged agreement so clearly as to justify a court of equity in recognizing it as against the legal effect of the conveyance. We are constrained to differ with the Court of Appeals and to agree with the justice of the Supreme Court. In a careful and exhaustive opinion Justice Hagner reviewed the evidence, and his conclusions therefrom commend themselves to our judgment. In view of this opinion it seems unnecessary to recapitulate all the testimony, and we shall content ourselves with stating the salient features thereof.

Mr. Avery was for some thirty-two years in the employ of the Government, and was an enthusiast in the scientific studies which he was pursuing in connection with such service. Prior to the purchase of the lot in controversy, and on Sep-

tember 13, 1882, he had made a will, in which, after giving to his "wife Lydia T. Avery, if she outlives me, in trust while she lives, all my real estate and personal property . . . to hold and to use for her support as long as she lives, and to keep in good condition for its final disposition," he declared:

"Having always had a love for the sciences, and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded to give all my real and personal property, with such exceptions as I may make hereafter in this will or in codicils annexed thereto, to the Board of Regents of the Smithsonian Institution to provide for its safekeeping and to use the income from it in extending the sciences by publishing," etc.

And again:

"This fund may be called 'the Avery fund' or 'the fund contributed by Robert S. Avery and his wife Lydia T. Avery for the extension of the sciences,' and all publications made with this fund must have a note thereon stating that they have been thus published.

"After the death of my wife, the Board of Regents of the Smithsonian Institution will be expected to select an executor of this will and provide for making the fund as useful as possible, limiting its use as much as they can to the objects specified."

His wife was fifteen or twenty years younger than he, and the expectation of both was that she would outlive him, though in fact she died some four years before he did, he living to be 86 years of age. After her death, on December 20, 1892, he prepared a codicil to the will of 1882, in which he recited that the conveyance of the property in question was made to his wife with his consent and upon the express understanding and condition that she should make a will in his favor, and that he had as evidence of this filed several affidavits of her statements in respect to the matter. Subsequently he executed the will of July 22, 1893, under which this suit was brought. The wills and codicil above referred to furnish indisputable evidence that prior to the purchase of

the real estate in controversy Mr. Avery intended that all his property, after certain legacies were paid, should go to the Smithsonian Institution, and that he understood that when the deed of this property was made to his wife it was upon the agreement described. That the agreement was made is clearly and positively testified to by one witness, Leland P. Shidy, who was associated in the government service with Mr. Avery, was the intimate friend of both Mr. and Mrs. Avery, living in the house with them from time to time during the years from 1873 to her death. We quote from his testimony:

"Q. Do you recollect the circumstance of the purchase by Mr. Avery of the property No. 326 A street southeast, in this city?

"A. Yes; I do. I was at their house at the time when they began talking about making the purchase, and they discussed it, in the first place, as to the advisability of getting the property at all, and after that was decided they discussed as to how the deed had better be made out, and Mrs. Avery thought it would be best to put the deed in her name, although her husband's money was paying for it exclusively, and he thought best to do so and had the deed made out in her name.

"Q. Did Mrs. Avery state any reason why the deed should be made out in her name?

"A. Yes. She wanted it in her name, in the first place, because she wanted to have the control of that property, as it was immediately contiguous to her own home, and then she thought she would be pretty certain to outlive her husband, and that it would be better in case of his death to have the title in her name than in his name.

"Q. State what final disposition, if any, was agreed upon by these two persons in your presence.

"A. It was agreed that she should have the property during her lifetime, and that she should make a will transferring it at her death to the Smithsonian Institute.

"Q. I understand that this conversation which you are now testifying to took place at or about the time of the actual pur-

chase and the making of the deed. Was any reference made to the ownership of this property that you can now recollect subsequent to the date when it was bought?

"A. After that they referred to it in a number of interviews while I was present, and every time they alluded to it with the same understanding — that is, that the property was to be hers during her lifetime and was to be disposed of at her death, in accordance with the will of Mr. Avery, with the rest of his property."

In addition there was the testimony of several witnesses of repeated conversations with Mrs. Avery, in which she made statements to the same effect. In a lease of the property made in 1887 Mr. Avery was named as the lessor. The receipts for rent given monthly for several years were signed by him alone, and so signed in her presence. There is nothing to contradict or discredit this evidence. While it may be true that no witness but the one was present at the time the agreement was entered into between Mr. and Mrs. Avery, yet his testimony is corroborated in the various ways to which we have referred. There is no arbitrary rule requiring the direct testimony of any particular number of witnesses to the ultimate fact. It is enough that there be a certainty in respect to it, and that certainty may result from an accumulation of direct and indirect evidences. The law is content if from a perusal of the entire record the mind is sure that there was a distinct agreement as claimed. That Mr. Avery understood that the agreement was made as stated the documentary evidence places beyond doubt; that it was in fact made, Mr. Shidy's testimony attests; and that Mrs. Avery understood that it was so made is evident not merely from Mr. Shidy's testimony but from her statements to many others. The will executed in 1882, and before the purchase of this lot, discloses his intent that all his property, save a few specific bequests, should go to the Smithsonian, and that the fund created thereby should bear his wife's as well as his own name, and the evidence makes it clear that she shared in his desire to make this fund as large as possible. While we agree to the proposition that parol testimony to overthrow the legal effect

of conveyances must be clear and satisfactory, yet we think this case comes within the scope of that rule, and that it is certain that just such an agreement was made between husband and wife as the appellant asserts. Even if it were a criminal case, we should not hesitate to hold that the evidence was sufficient to establish the fact beyond a reasonable doubt. It is true Mr. Avery in the codicil speaks of the agreement on the part of Mrs. Avery as one to make a will in his favor, while Mr. Shidy says that the agreement was that she should make a will transferring the property after her death to the Smithsonian, but this slight difference is immaterial and does not discredit the testimony. The Smithsonian was to be the ultimate beneficiary, and the manner in which this should be accomplished was merely a matter of detail, in respect to which the memory of the witnesses might differ. Indeed, Mr. Shidy does not purport to give the exact language used, but merely states the substance of the agreement.

We pass, therefore, to the further question: If it is true that the purchase price was paid by Mr. Avery, and the title conveyed to Mrs. Avery under an oral agreement, such as is described, will equity enforce this as against those claiming the record title?

The Court of Appeals was of the opinion that the agreement on the part of Mrs. Avery created an express trust, which, resting only in parol was invalid under the statute of frauds. It recognized the doctrine that an implied or resulting trust arises by operation of law, whenever one person buying and paying for an estate has the title placed in the name of another; but held that where the title is conveyed to a wife or child, or other person for whom the one paying the purchase money is under an obligation, legal or moral, to provide, no presumption of a trust arises, and that it is incumbent on one who claims the existence of such a trust to establish it by clear, positive and unequivocal proof, and that this had not been done in the present case. It did not substantially disagree with Mr. Justice Hagner on the propositions of law laid down by him, but differed mainly as to the strength and effect of the evidence.

The general proposition is unquestioned that, where upon a purchase of property the conveyance of the legal title is to one person while the consideration is paid by another, an implied or resulting trust immediately arises, and the grantee in the conveyance will be held as trustee for the party from whom the consideration proceeds.

"This rule has its foundation in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase money intends the purchase to be for his own benefit, and not for another, and that the conveyance in the name of another is a matter of convenience and arrangement between the parties for collateral purposes, and this rule is vindicated by the experience of mankind." 1 Perry on Trusts, (4th ed.) § 126.

The nature of this trust may be shown by parol evidence. This is in express accord with the provisions of the statute of frauds. Comp. Stat. D. C. 231, §§ 8, 9. The first of these sections requires that all declarations or creations of trust or confidence in respect to real estate shall be manifested and proved by some writing. Section 9 reads:

"*Provided, always,* That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding."

There is no statute in force in this District, such as is found in some States, putting an end to implied and resulting trusts. It is true that when the consideration is paid by a husband and the conveyance made to his wife there is a presumption that such a conveyance was intended for her benefit; but this is not a presumption of law but of fact, and can be overthrown by proof of the real intent of the parties.

"Whether a purchase in the name of a wife or child is an advancement or not, is a question of pure intention, though presumed in the first instance to be a provision and settle-

ment; therefore, any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption, and any acts or facts so immediately after the purchase as to be fairly considered a part of the transaction may be received for the same purpose. And so the declarations of the real purchaser, either before or at the time of the purchase, may be received to show whether he intended it as an advancement or a trust. Such declarations are received, not as declarations of a trust by parol or otherwise, but as evidence to show what the intention was at the time." 1 Perry on Trusts, (4th ed.) § 147; see also 2 Pomeroy's Eq. Juris. § 1041, and cases cited in notes.

This is in accord with the general proposition so often enunciated, that the statute of frauds was designed to prevent frauds, and that courts of equity will not permit it to be used to accomplish that which it was designed to prevent. As said in *Wood* v. *Rabe*, 96 N. Y. 414, 425:

"There are two principles upon which a court of equity acts in exercising its remedial jurisdiction. . . . One is that it will not permit the statute of frauds to be used as an instrument of fraud, and the other, that when a person through the influence of a confidential relation acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief."

And in *Haigh* v. *Kaye*, L. R. 7 Ch. App. 469, 474:

"The words of Lord Justice Turner, in the case of *Lincoln* v. *Wright*, 4 De G. & J. 16, where he said, 'The principle of this court is that the statute of frauds was not made to cover fraud,' express a principle upon which this court has acted in numerous instances, where the court has refused to allow a man to take advantage of the statute of frauds to keep another man's property which he has obtained through fraud."

If Mrs. Avery had during her lifetime conveyed this property to her sister and brothers it would have been a fraudulent breach of trust, and the like result follows if, now that she has died without executing a will, her heirs are permitted to take the property which was conveyed to her, not

as an advancement, but on an agreement that it should subsequently pass to this plaintiff.

The existence of an express agreement does not destroy the resulting trust. It was not an agreement made by one owning and having the legal title to real estate by which an express trust was attempted to be created, but it was an agreement prior to the vesting of title — an agreement which became a part of and controlled the conveyance; and evidence of its terms is offered, not for the purpose of establishing an express trust, but of nullifying the presumption of an advancement and to indicate the disposition which the real owner intended should be made of the property.

In *Robinson* v. *Leflore*, 59 Mississippi, 148, 151, it was said: "If the facts make out a case of resulting trust independently of the agreement, relief will not be denied because of the agreement; it being well settled that an invalid agreement cannot destroy an otherwise good cause of action, and this is no less true of resulting trusts than of other legal rights." *Keller* v. *Kunkel*, 46 Maryland, 565.

It may not be amiss to notice a few of the authorities. *Sherman* v. *Sherman*, 20 D. C. Rep. 330, is in point. In that case the husband made an agreement with his wife to buy real estate in her name, and that she should execute a will devising it to him. He bought one piece of real estate in her name, and she made a will so devising it. Subsequently he, in like manner, bought another piece, and, under the supposition that the will covered this after-acquired property, she made no new will, but died intestate as to that property, and it was ruled that a minor daughter, who inherited the title, held it in trust for him. In *Livingston* v. *Livingston*, 2 Johns. Ch. 537, it appeared that husband and wife agreed orally that he should purchase a lot in her name and build a house thereon, and that he should be reimbursed the cost thereof out of the proceeds of another house and lot of which she was seized, which should be sold for that purpose. The husband having executed the agreement upon his part, the contract failed by the sudden death of the wife, who left infant children, to whom the legal estate in both lots descended; and

it was held that the agreement should be carried into effect, and the lot which originally belonged to the wife was ordered to be sold and the husband reimbursed out of the proceeds. In his opinion the Chancellor said (p. 539):

"The presumption would undoubtedly be, in the first instance, that the conveyance to the wife was intended as an advancement and provision for her. This presumption was admitted in the case of *Kingdon* v. *Bridges*, 2 Vern. 67, but I do not see why it may not be rebutted, as has been done in this case, by parol proof. In *Finch* v. *Finch*, 15 Vesey, 43, it was held, that though when a purchase is made in the name of a person who does not pay the purchase money, the party paying it is considered in equity as entitled, yet if the person whose name is used be a child of the purchaser, it is, *prima facie*, an advancement, but that it was competent for the father to show, by proof, that he did not intend advancement, but used the name of his child only as a trustee."

Cotton v. *Wood*, 25 Iowa, 43. Here the facts were that the husband purchased a lot and had the same conveyed to his wife under an agreement that she would convey it to him, or to whomsoever he might assign his interest therein, upon his request. The wife died without making any conveyance, and it was held that the husband might maintain a suit to compel a conveyance to him by her heirs, the court saying:

"Where, upon the purchase of property, the consideration is paid by one, and the legal title conveyed to another, a resulting trust is thereby raised, and the person named in the deed will hold the property as trustee of the party paying the consideration. See Hill on Trustees, 91, and authorities cited in notes; 2 Story's Eq. Juris. § 1201. But if the person to whom the conveyance is made be one for whom the party paying the consideration is under obligation, natural or moral, to provide, the transaction will be regarded *prima facie* as an advancement, and the burden will rest on the one who seeks to establish the trust for the benefit of the payee of the consideration, to overcome the presumption in favor of the legal title by sufficient evidence.

"This presumption, though strong, is not conclusive. Hill

on Trustees, 97, and notes; *Sunderland* v. *Sunderland*, 19 Iowa, 328; *Livingston* v. *Livingston*, 2 Johns. Ch. 540; 2 Story's Eq. Juris. § 1203; 2 Washburn, Real Property, 173, 174, 204; *Welton* v. *Devine*, 20 Barb. 9; *Guthrie* v. *Gardner*, 19 Wend. 414; *Harder* v. *Harder*, 2 Sandf. Ch. 17." See also *Gray* v. *Jordan*, 87 Maine, 140; *Milner* v. *Freeman*, 40 Arkansas, 62; *Hudson* v. *White*, 17 R. I. 519; *Persons* v. *Persons*, 25 N. J. Eq. 250.

Somewhat analogous is *In re Duke of Marlborough*, L. R. 2 Ch. Div. 1894, 133, in which it appeared that the Duchess of Marlborough conveyed certain property to her husband, that he mortgaged the property for the purpose of raising money with which to pay his debts, she joining in the mortgage. Upon his death the Duchess claimed to be entitled to the property, subject to the mortgage, on the ground that it was part of the arrangement between them that he should reconvey to her, and it was held that she was entitled to such reconveyance.

We think it clear from these authorities, and many others that might be cited, (see White and Tudor's Leading Cases in Equity, (4th ed.) vol. 1, part 1, p. 314 and following, where the authorities are collated and the question discussed at length,) that the doctrine of an implied and resulting trust applies to a case in which the husband advances the purchase price for property which is conveyed to his wife, and that though it be true there is a presumption that the conveyance was intended as an advancement for her benefit, yet such presumption is subject to overthrow by proof of an agreement that such was not the purpose of the conveyance. And so the case comes back to the question of fact in respect to which we have already expressed our conclusions, whether there was sufficiently clear and positive evidence that this conveyance to Mrs. Avery was not intended as an advancement, but was made simply for the purposes of convenience and upon the agreement that this lot, together with other property belonging to Mr. Avery, should pass after both were dead to the Smithsonian Institution.

The remaining question arises upon the condition named in

the will, and its effect upon the legacy to the sister and brothers of Mrs. Avery. That these legatees did not acquiesce in the will is clear, not alone from the fact that prior to any suit they made demand for the possession of the realty, but also from the further fact that after the decree in the trial court, which, while denying any right to the real estate, at the same time provided for their receipt of the legacy upon filing a written relinquishment of all claims to the real estate, they persisted in carrying on the litigation by appeal to the Court of Appeals, insisting there as here upon their right to the property. It is obvious that in inserting this condition the testator had in mind the specific property hereinbefore considered. In the first will, made prior to the purchase of the property, no such provision is found. He was under no apprehension of any dispute as to the proposed disposition of his entire estate. But in a second codicil thereto executed after the death of his wife, and when, by her failing to execute a will as agreed upon, it became apparent that some question might be made concerning the ownership of this property, he did incorporate a somewhat similar provision. There is, however, a marked difference between the language there used and that here found. That language was, "these gifts are made on the condition that no attempt be made to break this will, and that if such an attempt be made, those who engage in it are to lose their claims to the gifts here made to them." That might be construed to forbid, under the penalty of losing the bequests, a contest of the will, any "disputing of the will," in the ordinary and natural meaning of those words, by denying that it was a lawful will, duly executed and attested by a testator of sound mind and not acting under undue influence. The language here used is that "these bequests are all made upon the condition that the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named." In other words, acquiescence in the will as a will, and in all its provisions, is the condition upon which the legatees can take their bequests. It is not confined to mere acquiescence in his selection of the residuary

legatee, but in his declaration as to the title to any named property and his devise of that property. No legatee is to receive a bequest who shall controvert that which he has stated to be a fact, or attempt to prevent that specific disposition of any property which he has made. And in case of a failure to comply with this condition the bequest is given over to the residuary legatee. The authorities fully warrant this conclusion.

"When legacies are given to persons upon conditions not to dispute the validity of, or the dispositions in wills or testaments, the conditions are not in general obligatory, but only *in terrorem*. If, therefore, there exist *probabilis causa litigandi*, the non-observance of the conditions will not be forfeitures. *Powell* v. *Morgan*, 2 Vern. 90; *Morris* v. *Burroughs*, 1 Atk. 404; *Loyd* v. *Spillet*, 3 P. Wms. 344. The reason seems to be this: A court of equity does not consider that the testator meant such a clause to determine his bounty, if the legatee resorted to such a tribunal to ascertain doubtful rights under the will, or how far his other interests might be affected by it; but merely to guard against vexatious litigation.

"But when the acquiescence of the legatee appears to be a material ingredient in the gift, which is made to determine upon his controverting the will or any of its provisions, and in either of those events the legacy is given over to another person, the restriction no longer continues a condition *in terrorem*, but assumes the character of a conditional limitation. The bequest is only *quousque*, the legatee shall refrain from disturbing the will; and, if he controvert it, his interest will cease and pass to the other legatee." 1 Roper on Legacies, 2d Am. Ed. 795; 4th Lond. Ed.

In *Cooke* v. *Turner*, 14 Sim. 493, the testator after giving to his daughter certain benefits out of his real estate revoked them and gave the estates over in case his daughter should dispute his will, or his competency to make it, or should refuse to confirm it when required by his executors. The daughter refused to confirm the will, and a suit having been instituted to establish it the daughter disputed its validity and the compe-

tency of her father to make it. It was held that the clause of revocation was valid; that the gift over took effect, and that the benefits given by the will to the daughter were forfeited by that which had taken place.

It is said in 2 Redfield on Wills, p. 298, in treating of the rule as to conditions against disputing the will, that "acceptance of the legacy renders the condition binding upon the legatee, upon the well-known doctrine of election." Election is thus defined by Sir William Grant, Master of the Rolls, in *Andrew* v. *Trinity Hall*, 9 Ves. 525, 533: "Where one legatee under a will insists upon something, by which he would deprive another legatee under the same will of the benefit, to which he would be entitled, if the first legatee permitted the whole will to operate."

This thought finds apt illustration in the case at bar. These legatees insist that the devise of this particular real estate to the plaintiff shall not stand; that it was not the property of the testator, and could not lawfully be devised by him, and therefore that the plaintiff shall not take the property which the testator proposed to give it. If, however, they had accepted this legacy burdened with the condition named, might it not fairly be said that they elected to acquiesce in the will and in the disposition specifically made by the testator of this property? Redfield in the same volume on page 370, after citing *Morrison* v. *Bowman*, 29 California, 337, in which this subject was considerably discussed, states as one of the propositions therein established:

"Although the testator has no legal power to dispose of the property of another, yet if he assumes to do so by his will, and such person accepts a devise or bequest under the will, it will be a confirmation of such disposition of his own property by the testator."

In *Beall* v. *Schley*, 2 Gill, 181, 200, the court said:

"It is only carrying out a plain intent of the testator, and giving to the residuary devisee that which the testator intended, and forbidding the heir from taking property not designed for him. From the earliest case on the subject, the rule is, that a man shall not take a benefit under a will, and

at the same time defeat the provisions of the instrument. If he claims an interest under an instrument, he must give full effect to it, so far as he is able to do so. He cannot take what is devised to him, and, at the same time, what is devised to another; although, but for the will, it would be his; hence he is driven to his election to say, which he will take." See also 1 Jarman on Wills, 415; 2 Story's Eq. Juris. § 1076.

The propositions thus laid down fully commend themselves to our approval. They are good law and good morals. Experience has shown that often after the death of a testator unexpected difficulties arise, technical rules of law are found to have been trespassed upon, contests are commenced wherein not infrequently are brought to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial, and as a result the manifest intention of the testator is thwarted. It is not strange, in view of this, that testators have desired to secure compliance with their dispositions of property and have sought to incorporate provisions which should operate most powerfully to accomplish that result. And when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall without compliance with that condition receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes.

The decree of the Court of Appeals will be reversed, and the case remanded to that court with instructions to enter a decree in conformity with this opinion.

The Chief Justice did not sit in this case, and took no part in its consideration and judgment.